CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 180

SUPERIOR BATH HOUSE COMPANY, APPELLANT,

vs.

Z. M. McCARROLL, COMMISSIONER OF REVENUES FOR THE STATE OF ARKANSAS

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

FILED JUNE 25, 1940.

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 7, 1940.

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[fol. 1]

IN SUPREME COURT OF THE UNITED STATES

Superior Bath House Company, Appellant,

v.

Z. M. McCarroll, Commissioner of Revenues for the State of Arkansas, Appellee

Praecipe for Transcript of Record—Filed May 22, 1940

To Mr. C. R. Stevenson, Clerk of the Supreme Court of the State of Arkansas:

You will please prepare the record upon appeal of the above named appellant to the Supreme Court of the United States, from the final judgment and decision of the Supreme Court of Arkansas, entered in said cause in favor of Z. M. McCarroll, Commissioner of Revenues for the State of Arkansas, appellee, and include in such record the following:

(1) The original Petition for Appeal to the Supreme Court of the United States, with the Assignment of Errors and Prayer for Reversal attached thereto.

(2) The Statement of Jurisdiction and appellees' reply thereto.

(3) The original Allowance of Appeal.

(4) A copy of the Bond and its approval.

(5) The original Citation with proof of service thereon.

(6) A copy of the opinion of the Supreme Court of the State of Arkansas in such cause.

(7) A copy of the minutes of said Court with reference to said cause.

(8) A copy of the Petition for Rehearing of the above named appellant.

(9) A copy of the record on appeal to said State Supreme Court from the Pulaski Chancery Court, including the exhibits thereto annexed and admitted in said cause.

[fol. 2] (10) Statement showing the filing of such Bond and the lodgment of copies of the Allowance of Appeal in your office.

(11) A return to such Allowance of Appeal and a statement of costs.

(12) Proof of service of Praecipe, Assignment of Errors, and Statement of Jurisdiction.

* * * * * * * *

(14) A copy of this Praecipe.

Please certify the same to the said Supreme Court of the United States under your seal, in accordance with the rules of said Court and the laws of the United States upon such appeals.

Terrell Marshall, E. R. Parham, Attorneys for Appellant, Residence and Post Office Address, Little Rock, Arkansas.

Dated this the 22 day of May, 1940.

[File endorsement omitted.]

[fol. 3] [Caption omitted]

[fol. 4] IN CHANCERY COURT OF PULASKI COUNTY

No. 60176

SUPERIOR BATH HOUSE COMPANY, Plaintiff,

v.

Z. M. McCARROLL, Commissioner of Revenues for the State of Arkansas, Defendant

COMPLAINT—Filed January 30, 1940

Plaintiff, for cause of action, says that it is a corporation organized under the Laws of the State of Arkansas and that its office and only place of business is situated on the United States Government Reservation in Garland County, Arkansas, known as Hot Springs National Park; that the sole business in which the Plaintiff is engaged consists of operating a bath house under a lease from the Secretary of the Interior of the United States on said Reservation, a copy of which lease is attached hereto, marked "Exhibit A" and made a part hereof, and that it maintains no office nor does it transact any business at any other place whatsoever.

Plaintiff says that the Defendant, Z. M. McCarroll, as Commissioner of Revenues for the State of Arkansas, is charged with the administration and enforcement of Act No. 118 of the General Assembly of the State of Arkansas for the year 1929, known as the Income Tax Act, and, as such, has assessed and is attempting to collect from the Plaintiff a tax at the rate of 2% per annum on its net income for the years 1928 to 1938, inclusive, based on its operations and business aforesaid.

That, on the 18th day of February, 1939, the said Commissioner of Revenues made an assessment against the Defendant for income tax, in accordance with his construction of said Act No. 118 of the General Assembly of the State of Arkansas for the year 1929, for the period aforesaid, on which assessment he is threatening to issue an execution and illegally and wrongfully sell the property of the Plaintiff for the satisfaction of the tax alleged to be due and that, [fol. 5] unless he is restrained from issuing said execution and making said illegal and wrongful sale, the Plaintiff will be deprived of its property, for which act it will have no complete and adequate remedy at law, to its irreparable loss and damage.

Plaintiff says that exclusive jurisdiction over the area to which its operation has been confined was ceded to the United States by Act No. 30 of the General Assembly of the State of Arkansas, approved February 21, 1903, reserving only the right to tax under authority of the laws of the State of Arkansas applicable to the equal taxation of personal property in that State, as personal property, of all structures and other property in private ownership on the Hot Springs Reservation, as accorded to the State of Arkansas by Act of Congress of March 3, 1931, c. 533, par. 5, 26 Stat. 855, which cession was accepted by the United States under Act of Congress of April 20, 1904, c. 1400, par. 1, 33 Stat. 187, which said lands had been, prior to said legislative enactments, forever dedicated to public use by Act of Congress of April 20, 1932, 4 Stat. at L. 505, par. 3, and Act of Congress of December 16, 1878, c. 5, 20 Stat. 258.

Plaintiff says that, at all times since said Acts of Cession and Acceptance, the United States has exercised sovereignty over said ceded lands, with the exception of the right to tax accorded the State of Arkansas by said Act of Congress of March 3, 1891, supra.

Plaintiff states that Act No. 220 of the Acts of Arkansas for 1931 exempts corporations organized under the laws of this State to do business outside the State from the payment of all income and intangible property taxes and that Act No. 118 of the Acts of Arkansas for 1929, as construed by the Defendant and as applied to the Plaintiff in this case, when read in connection with said Act No. 220 of the Acts [fol. 6] of Arkansas for 1931, constitutes an unconstitutional discrimination and classification and denies to the Plaintiff the equal protection accorded it under Amendment XIV to the Constitution of the United States and is in violation of the prohibition contained in said Amendment.

Plaintiff states that the act of the Commissioner in threatening to levy on and sell its property located on said United States Government Reservation for a tax alleged to be due by reason of Plaintiff's operations conducted solely on said Reservation would constitute the taking of its property without due process of law, in violation of Amendment V to the Constitution of the United States.

Plaintiff states that Act No. 220 of the Acts of Arkansas for 1931 exempts corporations organized under the laws of this State to do business outside the State from the payment of all income and intangible property taxes and that Act 118 of the Acts of Arkansas for 1929, as construed by the Defendant and as applied to the Plaintiff in this case, when read in connection with said Act No. 220 of the Acts of Arkansas for 1931, constitutes an unconstitutional discrimination and classification and denies to the Plaintiff the equal protection accorded it under Article II, Section 8, of the Constitution of the State of Arkansas and is in violation of the prohibition contained in said provision.

That the Action of the Defendant, as Commissioner aforesaid, in the construction and application of said Act No. 118 of the General Assembly of the State of Arkansas for 1929 to Plaintiff's operations is repugnant to said Acts of Congress of April 20, 1932, December 16, 1878, March 3, 1891, and April 20, 1904, and the construction placed on said Acts by the Courts of the United States.

Plaintiff says that, within the time prescribed by said Act No. 118 of the Acts of Arkansas for the year 1929, it prepared and submitted a corporation income tax return for the year 1928 and filed the same with the Commissioner of Revenues of the State of Arkansas under which it made the claim that "This Company is operating under a lease with

the Department of the Interior, and the bath house is situ-
[fol. 7] ated in the Hot Springs National Park and is not subject to tax under this law", which return was accepted by David A. Gates, as Commissioner of Revenues of the State of Arkansas, and at this date the Commissioner determined that Plaintiff was exempt from the exaction of said tax, which determination was not varied until the demand of the Defendant, as Commissioner of Revenues, for the preparation and filing of a return by the Plaintiff and a payment of the tax, on or about the 18th day of January, 1939, and the Plaintiff says that the Defendant is barred from the collection of the income tax accruing during the years 1928 to 1938, inclusive, by reason of said departmental ruling.

Plaintiff says that the collection of the tax on income for the years 1928 to 1935, inclusive, is barred by the Statute of Limitations, which it specifically pleads.

Wherefore, Plaintiff prays that the Defendant be permanently enjoined from the collection of said tax on an assessment for any year since the passage of said Act No. 118 of the Legislature of the State of Arkansas for 1929 from the issuance of any warrant or execution for the collection thereof and from the levy on or sale of any property of the Plaintiff for the satisfaction thereof, and for all other proper relief.

E. R. Parham, Solicitor for Plaintiff.

[fol. 8] Exhibit "A" to Complaint

This Agreement made and entered into this 25th day of July, 1938, by and between the United States of America, Acting in this behalf of Oscar L. Chapman, Assistant Secretary of the Interior, party of the first part, and hereinafter referred to as the Secretary, and the Superior Bath House, a corporation organized and existing under the laws of the State of Arkansas, its successors and assigns, party of the second part, hereinafter referred to as the Company,

Witnesseth: That pursuant to the provisions of a joint resolution of Congress, approved March 26, 1888 (25 Stat. 619), entitled "Joint Resolution to enable the Secretary of the Interior to utilize the hot water running to waste on the permanent reservation at Hot Springs, Arkansas", and of an Act of Congress approved March 3, 1891 (26 Stat. 842),

entitled "An Act to regulate the granting of leases at Hot Springs, Arkansas, and for other purposes", the parties hereto have mutually agreed and by these presents do mutually agree to and with each other as follows:

I. In consideration of the rents, covenants and stipulations hereinafter mentioned, reserved and contained, the Secretary hereby grants and leases unto the Company the plot of ground in the Hot Springs National Park, Arkansas, on which is located the Superior Bath House, more particularly described as follows:

Bath House Site No. 11, commencing at a point fifteen feet northerly from Station 11 on the building line of the Reservation Front, indicated on the plan formulated and filed in the Interior Department by the Superintendent of the Hot Springs Reservation May 12, 1891; running thence in a northerly direction along said Reservation Front for a distance of 85 feet; thence an angle of 91 degrees and 21 minutes to the right and in an easterly direction for a distance of 96.8 feet; thence an angle of 90 degrees to the right and in a southerly direction for a distance of 25.6 feet; [fol. 9] thence an angle of 90 degrees to the right and in a westerly direction for a distance of 40.7 feet; thence an angle of 90 degrees to the left and in a southerly direction for a distance of 4 feet; thence an angle of 90 degrees to the right and in a westerly direction for a distance of 4.3 feet; thence an angle of 90 degrees to the left and in a southerly direction for a distance of 53.8 feet; thence an angle of 90 degrees to the right and in a westerly direction for a distance of 49.8 feet to the place of beginning, the foregoing description being the same as that indicated on blueprint of plat of ground occupied by the Superior Bath House, Hot Springs, Arkansas, dated December, 1915, hereto attached and forming a part hereof.

II. To Have and To Hold for the term of twenty (20) years, commencing on the first day of January, 1938, and ending on the thirty-first day of December, 1957; together with the use of the hot waters from the Hot Springs National Park, for the purposes and only upon the terms and conditions herein mentioned; subject to the provisions of all existing laws of the United States and of such laws as may hereafter be enacted by Congress relative to, about or concerning the Hot Springs National Park, or the waters

thereon, and the rules and regulations that have been, or may hereafter be, made and established by the Secretary of the Interior pursuant to any such acts of Congress, which are accepted and made a part thereof in the same manner and to the same effect as if such acts or rules and regulations, or their several provisions, were specifically set forth herein.

III. In Consideration Whereof, the Company agrees to maintain and operate a bath house on said site within twenty *twenty* (20) bath tubs and all necessary appliances for providing baths to the public and to pay to the Secretary rental at the rate of eighty ($80.00) dollars per tub per annum for each and every bath tub allowed in said bath house, and whether erected or used or not, to be paid in advance in quarterly installments at the office of the super-[fol. 10] intendent of the park, subject to such changes as to rate as by law may be established and subject to the right of the Secretary, hereby reserved and acknowledged, to readjust and increase the amount of rent herein provided for to such sum per tub as he may deem just whenever during the continuance of this lease it may become necessary, and to meter the hot water and adjust the rate of rental on the basis of the actual amount of hot water furnished, whenever and if during the continuance of this lease such action may be deemed necessary: Provided, That the Secretary may fix the rate of charges for baths in said bath house, including the services of attendants, which rate of charges shall be kept continuously posted in the bath house by the Company; and the Company shall in no event charge other than such rates for baths therein, or enter into any combinations with the lessees of other bath houses on or near the Hot Springs National Park to fix the prices in violation of or different from the rates thus fixed. The number of tubs let may, in the discretion of the Secretary, be diminished or increased within the limit authorized by law, commencing from the first day of July in any year during the continuance of this lease, either upon his own motion or upon the written application of the Company to him to make such change, and rent shall then be paid for the number of tubs allowed; but there shall be no obligation on the part of the Secretary to supply hot water from the springs or reservoirs if at any time, in the judgment of the Secretary, said water shall not be sufficient; and for failure to furnish water in any case there shall be

no claim or demand of any kind against the United States or the Secretary.

IV. And the Company agrees to keep and maintain the said bath house and premises continuously in complete repair and good condition with a sufficient number of courteous and skilled attendants ans servants, in all particulars, as a first class bath house, and shall keep the furniture, furnishings and equipment in a first class condition and refit [fol. 11] and reequip the same whenever in the judgment of the Secretary the circumstances require it. In case the bath house or any of its furnishings or equipment be destroyed by fire, or otherwise, during the term of this lease the Company shall replace the same with a building and furniture, furnishings and equipment upon plans or specifications approved by the Secretary, or the site shall be immediately cleared and restored to its original condition by the Company and in a manner satisfactory to the Secretary.

In order that the resources of the Company may be conserved properly to enable it to keep its facilities at the standards deemed necessary by the Secretary, and that its capital will not be impaired the Company agrees to declare dividends payable in cash or in property only by the payments to shareholders as follows:

(a) Out of earned surplus, that is, the accumulate- earnings in excess of losses or the amount by which the net assets exceed the capital stock and liabilities; or

(b) Out of net profits earned during the preceding accounting period of one year, even though at the close of that period there is no credit balance in the surplus account; Provided, That approval of the Secretary shall have been first obtained in writing; or

(c) Out of paid-in surplus or surplus arising from reductions of stated capital; Provided, that approval of the Secretary shall have been first obtained in writing, and also provided that notice shall be given the shareholders receiving such dividends of the source thereof prior or concurrent to the payment thereof.

(d) If the value of the net assets, by reason of depreciation, losses or otherwise amounts to less than the aggregate amount of stated capital the corporation shall not declare dividends out of net profits pursuant to subdivision (b) of

this section, until the value of the net assets have been restored to such aggregate amount of the stated capital, or until approval of the Secretary shall have been first obtained in writing.

(e) No dividends will be declared when there is reason-[fol. 12] able ground for believing that thereafter the Company's debts and liabilities will exceed its assets, or that it would be unable to meet its debts and liabilities as they mature.

(f) No dividends will be declared out of the mere appreciation in value of the assets not yet realized, nor shall any dividends be declared from earned surplus representing profits derived from an exchange of assets and until such profits have been realized, or unless the assets received are currently realizable in cash.

(g) The Company agrees to declare dividends payable in shares or stock of the Company, or reduce the stated value of its shares, or number of shares only when in the discretion of the Secretary such action is deemed advisable and upon the prior approval of the Secretary in writing.

V. The company shall, at its own expense, securely and adequately, with the best material, wall, curb and cement the bottoms and sides and cover all hot-water springs now on the said site, or which may be developed on the same by any excavations made thereon, and securely pipe the same to the exterior limits thereof, connect that same in such manner and at such point or points as the Superintendent of the Park may designate, for utilization at receiving reservoirs or pumping stations or otherwise; and construct and maintain ways of access to all such springs at all times available to the Superintendent or any agent of the Secretary; also keep the grounds and walks attached to or under in connection with said bath house in a clean condition and free from litter and rubbish, to the satisfaction of the Superintendent. The Company shall also provide and maintain, at its own expense, ample and safe sewerage and drainage, with all necessary appliances, conducted on the best principle to secure sanitary co litions, and particularly to protect from contamination all springs situated on said site; and keep the same in such condition, to the satisfaction of the Superintendent.

VI. All blasting on said site and all excavations upon [fol. 13] the same shall be made only upon the permission and by direction of the Superintendent; and nothing herein contained shall be construed as a grant unto the Company of any exclusive right either to the waters of any spring that may be upon the land hereby leased, or elsewhere, nor to bore for water upon said lands, nor to any exclusive right to anything whatever save the possession of the premises hereby leased, nor as a grant to appropriate or use the premises or any part thereof otherwise or to any degree than as herein set forth nor to devote said building in whole or in part to any other purpose than herein expressed, or willfully permit the waste or use of the hot water furnished for other than bathing or drinking purposes. The Superintendent of the Park or other authorized agent or representative of the Secretary shall at any time have access to said bathhouse and premises, and every part thereof, for purposes of inspection.

VII. The Company, or its successors, or assigns, shall not during the life of this lease be interested, as lessee, assignee, owner, director, manager or otherwise, in any other bath house, bath house interest, or hot water privilege, at or near Hot Springs, as a stockholder in any corporation so interested, except by the approval of the Secretary upon formal application; and it will not enter into any combination or pool with any other party so interested to share any profits or leases of bath house business, or share any rates or charges or of accum-odations to be furnished or of other management of this or other bath houses at or near Hot Springs, Arkansas.

VIII. The Company will not employ any agents or drummers to solicit patronage for said bath house, nor pay, nor cause to be paid, directly or indirectly, any drummer or agent for any such solicitation, nor permit the same to be done by any agent, servant, attendant, employees, or rubber employed in or about said bath house, or permitted to work therein, and any violation of this provision shall cause the immediate forfeiture of this lease; and the Company shall, [fol. 14] when required by the Secretary, render to — during the life of this lease a monthly statement of the receipts and expenditures of said bath house, together with a statement of the number of baths daily administered therein, attested by the affidavit of the manager in charge.

IX. Neither this lease nor any interest therein shall be assigned, transferred or sublet by the Company to any person or persons, corporation or corporations, unless such assignment be first approved in writing by the Secretary, and any such attempted assignment or transfer, without such approval, shall not only be entirely void but such act of attempted assignment, unless approved, shall, of itself, cause the immediate forfeiture of this lease, the same in all particulars and results as if the term hereof had expired absolutely by limitation; all rights of action, however, being reserved by the United States for any breach of this contract by the Company.

X. It is agreed that in case of default of payment of rent as herein stipulated, or if the Company shall fail to keep and observe any and all covenants hereof, or if it violates any of the regulations or any of the provisions of the statutes relating to the Hot Springs National Park, then and in either event, after the presentation of the facts and on recommendations by the Superintendent of the Hot Springs National Park to the Director of the National Park Service the latter shall, with the approval of the Secretary, withhold the use of hot water for a period of thirty days, during which period the Company shall have the opportunity to appeal to the Secretary for a further review of the matter and if at the expiration of the period of thirty days and the conclusion of the further review the Secretary still approves of the recommendation of the Superintendent of the Park, then this lease and all rights or privileges hereunder shall be forfeited at the option of the Secretary, and the term hereof ended, and the said premises may be taken possession of on behalf of the United States in the same manner as if the full term of the lease had expired, except as hereinafter [fol. 15] provided, but there shall be ten days' notice to the Company thereof by service upon its representatives or placed conspicuously on the premises.

XI. It is further agreed that if, on the expiration of this lease by limitation of time, the premises shall be leased to someone other than the Company, the latter shall be given the opportunity to be reimbursed for the reasonable value of such of its buildings, fixtures, stock, equipment and other property thereon as the Secretary may, by an inspection made within six months prior to

such termination, determine to be appropriate for use on said premises and in enhancement of the value thereof for the purpose of conducting a bath house. The value of such property shall then be ascertained by a board of three appraisers appointed as follows: At least ninety days before the expiration of this lease, the Secretary and the Company shall choose one appraiser, and the two so selected shall then choose a third. If they do not within thirty days of their designation agree upon a third appraiser, then the Secretary shall select such third appraiser. The salary and expenses of thie third appraiser shall be paid by the Company. This board, or a majority thereof, shall within thirty days from the designation of the third member, and after an inspection of the property to be appraised and the taking of such testimony as may be adduced by the parties in interest, report their findings to the Secretary who may approve, set aside or modify the same, or order a new appraisal as he may see fit.

The value of such buildings and property when determined by the Secretary, whose decision in the premises shall be final, shall be paid at the time and in the manner directed by him, to the Company hereunder by the person, company, corporation or association to whom the premises are to be leased; Provided, that nothing herein shall be construed as creating a claim against the United States, or shall prevent the Secretary from leasing or subletting said property and the improvements thereon in such manner and upon such terms as may be necessary for the full [fols. 16-17] protection of the interests of the Government, or shall delay the surrender of the premises with all buildings, fixtures and appurtenances thereon upon any termination of this contract, or shall in any manner charge the Government for the use of such buildings or property.

XII. It is hereby distinctly understood that no exclusive privileges are, or are intended to be, created by this lease, but the same are hereby prohibited; and the terms hereof shall be so construed as to carry this understanding and agreement in this particular into complete effect.

XIII. No Member of Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise herefrom, but this restriction shall not be construed to extend to this

contract if made with a corporation or company for its general benefit.

In Witness Whereof the parties hereto have caused these presents to be executed and their seals affixed the day and year first above written.

Oscar L. Chapman (Signed), Assistant Secretary of the Interior. Superior Bath House, by Robt. H. Kittleberger, Pres.

Attest: W. F. Poke, Secty. Treas.

[File endorsement omitted.]

[fols. 18-19] IN PULASKI CHANCERY COURT

[Title omitted]

DEMURRER—Filed February 1, 1940

Now comes the Defendant and demurs to the Complaint of the Plaintiff herein, and for grounds thereof states:

1. Said Complaint does not contain allegations of fact sufficient to constitute a cause of action against the Defendant.

2. Defendant is not barred from collecting State income tax from Plaintiff for the years 1929 to 1938, inclusive, by the determination of a prior Commissioner of Revenues that Plaintiff was not subject to the payment of State income tax.

3. Defendant is not barred from collecting State income tax from Plaintiff for the years 1929 to 1935, inclusive, by the Statute of Limitations imposed by Section 26 of the State Income Tax Law.

Frank Pace, Jr., Lester M. Ponder, Solicitors for Defendant.

[File endorsement omitted.]

[fol. 20] IN CHANCERY COURT OF PULASKI COUNTY

No. 60176

SUPERIOR BATH HOUSE COMPANY, Plaintiff,

v.

Z. M. MCCARROLL, Commissioner of Revenues for the State of Arkansas, Defendant

DECREE—February 9, 1940

Now on this 7th day of February, 1940, this cause comes on to be heard before the Court upon the Complaint filed herein, and the Specific Demurrer of Defendant thereto, both parties being represented by their respective Attorneys. And the Court being well and sufficiently advised as to the Law in this case does hereby make the following Order:

That Defendant's Demurrer be sustained as to the failure of Plaintiff's Complaint herein to state a cause of action against Defendant.

That Defendant's Demurrer be sustained as to the contention of Plaintiff that Defendant is barred from collecting State Income Tax from Plaintiff for the years 1929 to 1938, inclusive, by the determination of a prior Commissioner of Revenues that Plaintiff was not subject to the payment of State Income Tax.

That the Defendant's Demurrer be overruled as to Plaintiff's contention that Defendant is barred from collecting State Income Tax from Plaintiff for the years 1929 to 1935, inclusive, by the Statute of Limitations imposed by Section 26 of the State Income Tax Law.

Plaintiff and Defendant duly excepted to the action of the Court at the time and asked that their exceptions be noted of record, which is hereby done. And Plaintiff refused to plead further and elected to stand upon its Complaint.

It is, therefore, by the Court considered, ordered and adjudged that Plaintiff's cause of action be and the same is hereby dismissed, and Defendant shall have and recover [fol. 21] of and from the Plaintiff all his costs herein paid, laid out and expended, for which execution may issue.

Plaintiff thereupon prayed an appeal to the Supreme Court of Arkansas from the action of the Court in sus-

taining Defendant's Demurrer in part, which is hereby granted.

And Defendant thereupon prayed a cross-appeal to the Supreme Court of Arkansas from the action of the Court in overruling his Demurrer in part, which is hereby granted.

February 9, 1940. (Chancery Record 116, page 574)

[fol. 22] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 23] IN SUPREME COURT OF ARKANSAS

No. 5959

SUPERIOR BATH HOUSE COMPANY, Appellant,

v.

Z. M. McCARROLL, Commissioner, Appellee

Appeal from Pulaski Chancery Court

JUDGMENT—April 1, 1940

This cause came on to be heard upon the transcript of the record of the chancery court of Pulaski County and was argued by solicitors, on consideration whereof it is the opinion of the court that there is no error in the proceedings and decree of said chancery court in this cause except in this: The court erred in holding that the appellee, by limitation, lost his right of action to collect tax on income of appellant for the years 1929 to 1935 inclusive.

It is therefore ordered and decreed by the court that the decree of said chancery court in this cause rendered be, and the same is hereby, except with respect to the error aforesaid, affirmed, and that on the cross appeal of the appellee, and for the error aforesaid, the said decree be reversed in so far as it holds that appellee is not entitled to collect the tax for the years 1929 to 1935 inclusive, and that this cause be remanded to said chancery court for further proceedings to be therein had according to the principles of equity, and not inconsistent with the opinion herein delivered.

It is further ordered and decreed that said appellee recover of said appellant all his costs in this court in this cause expended, and have execution thereof.

[fol. 24] IN SUPREME COURT OF ARKANSAS

No. 212

SUPERIOR BATH HOUSE COMPANY

v.

McCARROLL, Commissioner of Revenues

OPINION—April 1, 1940

GRIFFIN SMITH, C. J.:

The suit from which this appeal proceeds was one to enjoin the commissioner of revenues from collecting taxes on incomes for 1928 to and including 1938.[1] A special demurrer was filed on behalf of the commissioner. The complaint was dismissed in respect of taxes for 1936, 1937, and 1938. As to collections sought to be enforced for other years mentioned in the complaint, it was held that by limitation the commissioner had lost his right of action.[2]

Appellant's income is derived from personal services and use of property on Hot Springs Reservation, in Garland County.[3] It is insisted that exclusive jurisdiction over the Reservation has been ceded to the United States, and that Arkansas reserved only the right to tax, under laws of the state applicable to equal taxation of personal property, the structures erected on leases and other personal property in private ownership.

There is the further contention that act 220 of the Arkansas General Assembly, approved March 26, 1931, exempts from payment of the tax domestic corporations doing business entirely without the state, and that act 118 of 1929, "as applied to the appellant in this case, when read in con-

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[1] Act 118, approved March 9, 1929.

[2] Section 26 of Act 118, supra.

[3] Act 30 of the General Assembly of Arkansas, approved February 21, 1903.

nection with act 220, constitutes an unconstitutional discrimination and classification against the appellant, and denies to it the equal protection accorded under the Fourteenth Amendment,[4] * * * [and is violative of] Art. 2, Sec. 8, of the constitution of Arkansas."

Appellant avers that a return on its income for 1928 was filed in 1929 in a timely manner; that with the return it claimed exemption because operations productive of earn-
[fol. 25] ings were conducted under a lease from the department of the interior; that the commissioner's ruling was consonant with the claimed exemption, and that no further demand had been made until January, 1939.

By act of March 3, 1891, c. 533, Sec. 5, 26 Stat. 844, U. S. Code Annotated, Title 16, Sec. 365, consent of the United States was given "for taxation, under the authority of the laws of the State of Arkansas applicable to the equal taxation of personal property in that state, as personal property of all structures and other property in private ownership on the Hot Springs National Park".

By act 30 of the Arkansas General Assembly, approved February 21, 1903, exclusive jurisdiction over the Hot Springs Reservation was "ceded and granted" the United States, with the proviso, however, that the act should not prevent the execution of any process of the state, civil or criminal, on any person who may be on such reservation or premises; provided further, that the right to tax all structures and other property in private ownership on the Hot Springs Reservation accorded the state. [by act of 1891] is hereby reserved to the state of Arkansas."

Subsequent to approval of act 30, supra, the Congress enacted that "All fugitives from justice taking refuge within [the boundaries of the Reservation] shall, on due application to the executive of [Arkansas], whose warrant may lawfully run within said territory for said purpose, be subject to the laws which apply to fug*a*tives from justice found in the state of Arkansas. Said section shall not be

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[4] "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

construed as to interfere with the right to tax all structures and other property in private ownership within the boundaries [described], accorded to the state of Arkansas by Sec. 365 of [Title 16, United States Code Annotated'']. [5]

Buckstaff Bath House Company v. McKinley, Commissioner,[6] upheld validity of the Arkansas unemployment compensation tax.[7] It was there said that ''The tax laid by act 155 is not a tax on personal property; nor is it, in *any* sense, a property tax''.

[fol. 26] Pollock v. Farmers Loan & Trust Company classifies a [8] tax on the income from real and personal property as a direct tax on the property.

Stanley v. Gates, 179 Ark. 886, 19 S. W. 2d 1000, holds that the income tax imposed by the act of 1929 is not a property tax. Mr. Justice Hart (later Chief Justice) who wrote the opinion in the Stanley-Gates Case, said: ''It has been well said that 'a tax on income is not a tax on property, and a tax on property does not embrace incomes'. Hence, a majority of the court holds that 'property', as the term is used in art. 16, Sec. 5 of the constitution, means the property itself as distinguished from the annual gain or revenue from it''.

The Buckstaff Bath House Case was appealed to the Supreme Court of the United — and affirmed.[9] Substance of the opinion, written by Mr. Justice Douglas, is that while the state tax for social security is an excise, it comes within the permission granted by congress to tax personal property on the Hot Springs Reservation. The holding is influenced by the social security act of congress, which the court thought gave Arkansas ''implied authority'' to levy the tax. Concurrence of Mr. Justice Reed is on the ground that the act of congress of 1891 should be interpreted to give consent to the state to levy the excise for unemployment compensation.

We think there is authority in the general language of the act of 1891 for the state to extend to leassees of per-

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[5] U. S. Code Annotated, Title 16, Sec. 372.

[6] 198 Ark. 91, 127 S. W. 2d 802.

[7] Act 155, approved February 26, 1937.

[8] 158 U. S. 601, 617, and 635.

[9] Supreme Court Reporter for January 1, 1940, Vol. 60, No. 4; Law Ed., Advance Opinions, Vol. 84, No. 4.

sonal property on the Reservation the tax assessed against all other citizens within the state. Although classified as an excise, our income tax is treated by the courts as having many of the characteristics of a property tax. An excise is not within our constitutional provisions limiting the rate of taxes on property and providing for uniformity.

It would be an anomolous situation indeed if we should say that an excise tax levied for unemployment atainst those coming within the law's classification included [fols. 27-28] operations within the Reservation when authority for its exaction came from a state statute as distinguished from congressional authority, but that a tax on incomes levied uniformly against all citizens could not extend to the Reservation because the term "personal property" was used in the act of 1891.

We do not agree with appellant that the Reservation, for purposes of taxation, is not within the state. If this theory were correct the Buckstaff Bath House Case was wrong, for act 155 of the Arkansas General Assembly could have no extra-territorial effect.

The state is not estopped by action of the commissioner of revenues in 1929. It has often been held that the determination by an administrative agent of the state that an assessment made by law is not to be collected does not affect the right of enforcement. The latest decision directly in point is Southwestern Distilled Products Company, Inc., v. State, ex rel. Humphrey, Vol. 72 No. 3, Law Reporter for January 29, 1940. The instant case is unlike State, ex rel. Attorney General, v. New York Life Insurance Company,[10] where Sec. 13899 of Pope's Digest was held to apply. There the insurance company had declared all premiums upon which a report was required.

In the case at bar appellant, in its report, urged its exemption, and when the commissioner (acting, of course, in good faith) concluded the petitioner was not subject to the tax, no report was made for any of the succeeding six years. Appellant is not subject to the tax for 1928, but will be required to pay for all unreported years.

The decree is affirmed on appeal, and reversed on cross-appeal. The cause is remanded for further proceedings under the law as here declared.

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[10] 198 Ark. 820, 131 S. W. 2d 639.

[fol. 29] IN SUPREME COURT OF ARKANSAS

[Title omitted]

PETITION FOR REHEARING—Filed April 16, 1940

Appellant prays that it be granted a rehearing in this cause, and for reason says:

That the Court has failed to take into consideration that the General Assembly of the State of Arkansas ceded exclusive jurisdiction to the Federal Government over the lands involved, in the year 1903, by Act No. 30 of the General Assembly of the State of Arkansas, approved February 21, 1903, reserving only the right of "taxation under the authority of the laws of the State of Arkansas applicable to the equal taxation of personal property in that State, as personal property, of all structures and other property in private ownership on the Hot Springs Reservation" as defined in Act of Congress of March 3, 1891, c. 533, par. 5, 26 Stat. 844.

That the Court erred in holding that the State Income Tax Act of 1929 had the characteristics of a property tax, within the meaning of "property" in said Act of Congress of March 3, 1891.

That the Court erred in failing to hold that Act No. 220 of the Acts of Arkansas for 1931 in connection with and as a part of Act No. 118 of the Acts of Arkansas for 1929, precluded an assessment and collection of taxes on the income of appellant by the provisions of the equal protection afforded it under Amendment XV to the Constitution of the United States.

[fol. 30] That the Court erred in failing to hold that the act of the Commissioner in threatening to levy on and sell its property located on said United States Government Reservation for an alleged tax by reason of the operations thereon constituted the taking of its property beyond the sovereignty of Arkansas and on account of operations conducted beyond said sovereignty, in violation of Amendment V to the Constitution of the United States.

That the Court's opinion is repugnant to the Acts of Congress of April 20, 1832, 4 Stat. at L. 505, par. 3; December 16, 1878, c. 5, 20 Stat. 258; March 3, 1891, c. 533, par. 5, 26 Stat. 844; and April 20, 1904, par. 1, 33 Stat. 187, and the construction placed on said Acts by the Courts of the United States.

That the opinion of the Court in holding that the tax in question was a property tax within the meaning of said Act of March 3, 1891, is contrary to the third paragraph of the preamble to Act No. 118 of the General Assembly of Arkansas for 1929, and the purposes of said Act, in that said Act No. 118, Section 3, par. (b), specifically levies the tax on corporations as an excise and not a property tax, as distinguished from the levy of a tax on the income of property of nonresidents by paragraph (c) of said Section 3, and that the holding of the Court that the tax in question is a property tax within the meaning of said Act of Congress of March 3, 1891, would cause the said income tax levy to be in conflict with Article XVI, par. 5, sub-sec. (a), and Article XVI, par. 8, of the Constitution of the State of Arkansas, in that said tax is not equal and uniform in that it taxes income at a higher rate than other property of equal value, and in that it exceeds the maximum rate of levy on assessed valuation specified in the provisions in the sections of the Constitution aforesaid.

[fol. 31] Wherefore, appellant respectfully prays that a rehearing be granted in this cause.

E. R. Parham, Solicitor for Appellant.

State of Arkansas,
County of Pulaski, ss:

I hereby certify that I am the solicitor for the appellant and am familiar with the contents of this petition and motion for rehearing and verily believe that the grounds are well taken, and for that reason the petition and motion is submitted.

E. R. Parham.

Subscribed and sworn to before me this 16th day of April, 1940. L. P. Biggs, Notary Public. (Seal.)

[File endorsement omitted.]

[fol. 32] IN SUPREME COURT OF ARKANSAS

ORDER OVERRULING PETITION FOR REHEARING—May 13, 1940

Being fully advised, the petitions for rehearing in the following causes, are by the court severally overruled, viz:

* * * * * * *

5959. Superior Bath House Company v. Z. M. McCarroll, Commr.;

* * * * * * *

[fol. 33] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR ALLOWANCE OF APPEAL—Filed May 22, 1940

To the Chief Justice of the Supreme Court of the State of Arkansas:

Your petitioner, Superior Bath House Company, respectfully shows:

Your petitioner is the appellant in the above entitled cause.

This cause originated in the Pulaski Chancery Court, in which Court, by the complaint of the plaintiff, there was drawn in question the constitutionality of Act No. 118 of the General Assembly of the State of Arkansas for the year 1929, as amended by Act No. 220 of the General Assembly of Arkansas for the year 1931, in that Act No. 220 of the Acts of Arkansas for 1931 exempts from the payment of all income and intangible property taxes corporations organized under the laws of this State to do business outside the State; that Act No. 118 of Arkansas for 1929 as applied to appellant, when read in connection with Act No. 220 of the Acts of Arkansas for 1931, denied to appellant equal protection accorded it under Amendment XIV to the Constitution of the United States; that the action of the Commissioner in threatening to levy on and sell its property located on the United States Government Reservation of Hot Springs National Park for an alleged income tax due by

reason of appellant's operations which were conducted solely on said Reservation, constituted the taking of its property without due process of law, in violation of Amend-[fol. 34] ment V to the Constitution of the United States; and that the action of the Commissioner in the construction and application of Act No. 118 of the General Assembly of the State of Arkansas for 1929, as amended by Act No. 220 of the Acts of Arkansas for 1931, to appellant's operations conducted as aforesaid, was repugnant to the laws of the United States applicable to the Hot Springs National Park Reservation, particularly Act of Congress of March 3, 1891, c. 533, par. 5, 26 Stat. 844; Act of Congress of April 20, 1904, c. 1400, par. 1, 33 Stat. 187; Act of Congress of April 20, 1832, 4 Stat. at L. 505, par. 3; and Act of Congress of December 16, 1878, c. 5, 20 Stat. 258; and the decision in said Court was in favor of the constitutionality and the validity of said Act No. 118 of Arkansas for 1929, as amended.

The Supreme Court of the State of Arkansas is the highest court in this State in which a decision in this suit can be had.

In said Court there was drawn in question the constitutionality of Act No. 118 of the General Assembly of the State of Arkansas for the year 1929, as amended by Act No. 220 of the General Assembly of Arkansas for the year 1931, in that Act No. 220 of the Acts of Arkansas for 1931 exempts from the payment of all income and intangible property taxes corporations organized under the laws of this State to do business outside the State; that Act No. 118 of Arkansas for 1929 as applied to appellant, when read in connection with Act No. 220 of the Acts of Arkansas for 1931, denied to appellant equal protection accorded it under Amendment XIV to the Constitution of the United States; that the action of the Commissioner in threatening to levy on and sell its property located on the United States Government Reservation of Hot Springs National Park for an alleged income tax due by reason of appellant's operations which were conducted solely on said Reservation, con-[fol. 35] stituted the taking of its property without due process of law, in violation of Amendment V to the Constitution of the United States; and that the action of the Commissioner in the construction and application of Act No. 118 of the General Assembly of the State of Arkansas for 1929, as amended by Act No. 220 of the Acts of Arkansas for 1931,

to appellant's operations conducted as aforesaid, was repugnant to the laws of the United States applicable to the Hot Springs National Park Reservation, particularly Act of Congress of March 3, 1891, c. 533, par. 5, 26 Stat. 844; Act of Congress of April 20, 1904, c. 1400, par. 1, 33 Stat. 187; Act of Congress of April 20, 1832, 4 Stat. at L. 505, par. 3; and Act of Congress of December 16, 1878, c. 5, 20 Stat. 258.

The decision of said Court was in favor of the constitutionality and the validity of said Act No. 118 of Arkansas for 1929, as amended.

Therefore, in accordance with paragraph 237 (a) of the Judicial Code, and in accordance with the rules of the Supreme Court of the United States, your petitioner respectfully shows this Court that the case is one in which, under the legislation in force, when the Act of January 31, 1928, was passed, a review could be had in the Supreme Court of the United States on a writ of error as a matter of right.

The errors upon which your petitioner claims to be entitled to an appeal are more fully set out in the Assignment of Errors filed herewith, and there is likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States, as provided by Rule 12 of the Supreme Court of the United States.

Wherefore, your petitioner prays for the allowance of an appeal from the Supreme Court of Arkansas, the highest court of said State in which a decision in this cause can be had, to the Supreme Court of the United States, in order [fol. 36] that the decision and final judgment of said Supreme Court of the State of Arkansas may be examined and reversed, and also prays that a transcript of the record proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of the State of Arkansas, under his hand and seal of said Court, may be sent to the Supreme Court of the United States, as provided by law, and that the bond for costs tendered by the petitioner be approved.

Terrell Marshall, E. R. Parham, Attorneys for Petitioner.

Dated May 22, 1940.

[File endorsement omitted.]

[fol. 37] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ALLOWANCE OF APPEAL—Filed May 22, 1940

The petition of Superior Bath House Company, the appellant in the above entitled cause, for an appeal to the Supreme Court of the United States from the judgment of the Supreme Court of Arkansas; having been filed with the Clerk of the Supreme Court of Arkansas and presented therein, accompanied by Assignment of Errors and Statement of Jurisdiction, as provided by Rule 12 of the Rules of the Supreme Court of the United States, and the record in this cause having been considered, it is hereby,

Ordered that an appeal be and it is hereby allowed to the Supreme Court of the United States from the final judgment dated the 1st day of April, 1940, on which a petition for rehearing was entertained and overruled on the 13th day of May, 1940, in the Supreme Court of the State of Arkansas, as prayed in said petition, and that the Clerk of the Supreme Court of the State of Arkansas shall within forty days from this date make and transmit to the Supreme Court of the United States under his hand and seal of said Court, a true copy of the material parts of the record herein, which shall be designated by praecipe or stipulation of the parties, or their counsel herein, in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

[fol. 38] It is further ordered that said appellant shall give a good and sufficient bond for costs in the sum of $1,000; that it shall prosecute said appeal to effect and answer all costs if it fails to make good its plea.

Griffin Smith, Chief Justice of the Supreme Court of the State of Arkansas.

Dated: May 22, 1940.

[File endorsement omitted.]

[fol. 39] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed May 22, 1940

Now comes the above appellant and files herewith its petition for an allowance of appeal and says that there are errors in the records and proceedings of the above entitled case, and for the purpose of having the same reviewed in the United States Supreme Court makes the following assignment:

The Supreme Court of Arkansas erred in holding and deciding that Act No. 118 of the General Assembly of Arkansas for the year 1929, in connection with and as amended by Act No. 220 of the General Assembly of Arkansas for the year 1931, authorized the taxation of appellant's income, which was derived solely from business conducted on the Hot Springs National Park Reservation in Garland County, Arkansas, and where it maintained its only office. The validity of said Act, so far as it attempted to tax appellant's income, was denied and drawn in question by it on the ground that it denied to appellant the equal protection accorded it under Amendment XV to the Constitution of the United States; that the action of the Commissioner in threatening to levy on and sell its property located on said United States Government Reservation under said Act for its income so earned, constituted the taking of its property without due process of law, in violation of Amendment V to the Constitution of the United States, and that [fol. 40] said Act as amended was repugnant to the laws of the United States applicable to the Hot Springs National Park Reservation, particularly Act of Congress of March 3, 1891, c. 533, par. 5, 26 Stat. 844; Act of Congress of April 20, 1904, c. 1400, par. 1, 33 Stat. 187; Act of Congress of April 20, 1832, 4 Stat. at L. 505, par. 3; Act of Congress of December 16, 1878, c. 5, 20 Stat. 258; and that the sovereignty over the area affected by the aforesaid Acts was ceded to the United States by Act No. 30 of the General Assembly of Arkansas for 1903, reserving only the right to tax as personal property all structures and other property in private ownership in the Hot Springs National Park.

The said errors are more particularly set forth as follows:

The Supreme Court of Arkansas erred in holding and deciding:

I.

That Act No. 118 of the Acts of Arkansas for 1929, as amended by Act No. 220 of the Acts of Arkansas for 1931, in taxing appellant's income, did not constitute an unconstitutional discrimination and classification, denying to appellant the equal protection accorded it under Amendment XIV to the Constitution of the United States and that the tax so levied was not in violation of the prohibition contained in said Amendment.

II

In failing to hold and decide that the levy and sale of its property located on said United States Government Reservation for income tax under the provisions of Act No. 118 of Arkansas for 1929, as amended by Act No. 220 of Arkansas for 1931, resulting from business conducted solely thereon, constituted the taking of its property without due process of law, in violation of Amendment V to the Constitution of the United States.

[fol. 41] III

That Act No. 30 of the General Assembly of Arkansas for the year 1903 reserved to the State of Arkansas the right to tax appellant's income arising from operations conducted solely on the Hot Springs National Park Reservation.

IV

That the Act of Congress of March 3, 1891 (c. 533, par. 5, 26 Stat. 844) and the Act of Congress of April 20, 1904 (33 Stat. 187, 16 U. S. C. A., paragraphs 372-383) by extending to the State of Arkansas the right to tax as personal property all structures and other property in private ownership on the Hot Springs National Park Reservation, authorized the taxation of appellant's income under the provisions of Act No. 118 of Arkansas for 1929, as amended by Act No. 220 of Arkansas for 1931.

V

That by the compact entered into between the United States of America and the State of Arkansas respecting

sovereignty and jurisdiction of the area embraced in the Hot Springs National Park, as reflected by Acts of Congress of April 20, 1832, 4 Stat. at L. 505, par. 3; December 16, 1878, c. 5, 20 Stat. 258; March 3, 1891, c. 533, par. 5, 26 Stat. 844; and April 20, 1904, c. 1400, par. 1, 33 Stat. 187; and Act No. 30 of the General Assembly of the State of Arkansas for 1903, the State of Arkansas was not limited to taxation, as personal property, of structures and personal property in said area.

For which errors the appellant, Superior Bath House Company, prays that the said judgment of the Supreme Court of Arkansas dated the 1st day of April, 1940, be reversed and a judgment rendered in favor of the appellant, and for costs.

Terrell Marshall, E. R. Parham, Attorneys for Superior Bath House Company.

[File endorsement omitted.]

[fols. 42-43] Bond on appeal for $1,000.00 approved and filed May 22, 1940, omitted in printing.

[fol. 44] Citation in usual form showing service on Frank Pace, Jr., filed May 22, 1940, omitted in printing.

[fol. 45] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 46] In Supreme Court of the United States

Statement of Appellant's Points on Which It Intends to Rely, and Designation of Parts of the Record Necessary for Consideration—Filed July 8, 1940.

Appellant adopts its Assignment of Errors as a statement of the points upon which it intends to rely, and states that the entire record, as filed, is necessary for a proper consideration of the case.

Terrell Marshall, E. R. Parham, Attorneys for Appellant.

I acknowledge service for the appellee of the foregoing statement of the appellant of the points on which it intends to rely, and of that part of the record which it considers necessary for the proper consideration of the case.

This the 6th day of July, 1940.

Frank Pace, Jr., Attorney for Appellee.

[fol. 47] [File endorsement omitted.]

Endorsed on cover: File No. 44529, Arkansas Supreme Court, Term No. 180. Superior Bath House Company, Appellant, vs. Z. M. McCarroll, Commissioner of Revenues for the State of Arkansas. Filed June 25, 1940. Term No. 180 O. T. 1940.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 180

SUPERIOR BATH HOUSE COMPANY,
Appellant,

vs.

Z. M. McCARROLL, Commissioner of Revenues for the State of Arkansas.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS.

STATEMENT AS TO JURISDICTION.

Terrell Marshall,
E. R. Parham,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 180

SUPERIOR BATH HOUSE COMPANY,
Appellant,

vs.

Z. M. McCARROLL, COMMISSIONER OF REVENUES FOR THE STATE OF ARKANSAS.

STATEMENT AS TO JURISDICTION.

Appellant, in support of the jurisdiction of this Court to review the above entitled cause on appeal, respectfully states:

(A) This is an appeal from a judgment of the Supreme Court of Arkansas taken under the provisions of United States Code, Title 28, Section 344 (Judicial Code, Sec. 237), par. (a) and amendments, and involves the constitutionality and the validity of a statute of the State of Arkansas taxing the income of appellant derived solely from business conducted in and on the Hot Springs National Park Reservation in Garland County, Arkansas, where it had its only office and establishment. Appellant contended that the statute of Arkansas as construed and applied to its operations violated the equal protection accorded to it under

Amendment XIV to the Constitution of the United States; that it constituted the taking of its property without due process of law, in violation of Amendment V to the Constitution of the United States; and was repugnant to the laws of the United States enacted with respect to the Hot Springs National Park Reservation.

(B) Act No. 118 of the General Assembly of the State of Arkansas for the year 1929, known as the Income Tax Act, imposed a tax of 2% of the net income of corporations organized under the laws of the State "with respect to carrying on or doing business". This Act was amended by Act No. 220 of the General Assembly of the State of Arkansas for the year 1931, exempting domestic corporations organized for the purpose of doing business entirely outside of the State of Arkansas from the payment of general or special taxes (except tangible property tax) imposed upon corporations organized for the purpose of doing business within the State. Within the time prescribed by Act No. 118 of the Acts of Arkansas for 1929, appellant prepared and submitted a return for the year 1928, which was filed with the Commissioner of Revenues of the State of Arkansas, under which it claimed exemption by reason of its operations having been confined to the Hot Springs National Park, which return was accepted and acquiesced in until a demand of the Commissioner of Revenues for the filing of a return by appellant and the payment of tax over said period, on or about the 18th day of January, 1939.

The provisions of the Constitution and the Acts of Congress and of the General Assembly of the State of Arkansas fixing sovereign jurisdiction over appellant's operations are set forth as follows:

Amendment V, Constitution of the United States:

> "No person shall * * * be deprived of life, liberty or property without due process of law; * * *"

Amendment XIV, Constitution of the United States:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Act of Congress, April 20, 1832, 4 Stat. at L. 505, par. 3:

"The hot springs in said territory, together with four sections of land, including said springs, as near the center thereof as may be, shall be reserved to the future disposal of the United States and shall not be entered, located or appropriated for any other purpose whatever."

Act of Congress, December 16, 1878, c. 5, 20 Stat. 258:

"Provided, that all titles given or to be given by the United States shall explicitly exclude the right to the purchaser of the land, his heirs or assigns, from forever boring thereon for hot water; and the hot springs, with the reservation and mountain, are hereby dedicated to the United States and shall remain forever free from sale or alienation."

Act of Congress, March 3, 1891, c. 533, par. 5, 26 Stat. 844:

"The consent of the United States is hereby given for the taxation under the authority of the laws of the State of Arkansas applicable to the equal taxation of personal property in that State, as personal property, of all structures and other property in private ownership on the Hot Springs Reservation."

Act No. 30 of the General Assembly of the State of Arkansas, approved February 21, 1903:

"Section 1. That exclusive jurisdiction over that part of the Hot Springs Reservation known and de-

scribed as part of the Hot Springs mountain and whose limits are particularly described by the following boundary lines * * * all in Township 2 South, Range 19 West, in the County of Garland, State of Arkansas, being part of the permanent United States Hot Springs Reservation, is hereby ceded and granted to the United States of America, to be exercised so long as the same shall remain the property of the United States; provided, that this grant of jurisdiction shall not prevent the execution of any process of the State, civil or criminal, on any person who may be on such reservation or premises; provided, further, that the right to tax all structures and other property in private ownership on the Hot Springs Reservation accorded the State by the Act of Congress approved March 3, 1901" (1891) "is hereby reserved to the State of Arkansas."

Act of Congress, April 20, 1904, c. 1400, par. 1, 33 Stat. 187:

"The portion of the Hot Springs mountain reservation in the State of Arkansas situated and lying within boundaries defined as follows * * * all in Township 2 South, Range 19 West, in the County of Garland and State of Arkansas, being a part of the permanent United States Hot Springs Reservation, sole and exclusive jurisdiction over which was ceded to the United States by an act of the General Assembly of the State of Arkansas * * *, which cession is hereby accepted * * * shall be under the sole and exclusive jurisdiction of the United States * * * Provided that nothing in this act shall be so construed as to forbid the service within said boundary of any civil or criminal process of any court having jurisdiction in the State of Arkansas * * * And provided, further, that this act shall not be so construed as to interfere with the right to tax all structures and other property in private ownership within the boundaries above described accorded to the State of Arkansas by section 5 of the Act of Congress approved March 3, 1891, entitled 'An Act to Regulate the Granting of Leases at Hot Springs, Arkansas, and for Other Purposes'."

Constitution of Arkansas (1874), Art. XVI, par. 5:

"All property subject to taxation shall be taxed according to its value (a), that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State (b). No one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value (c), provided the General Assembly shall have power from time to time to tax hawkers, peddlers (d), ferries, exhibitions and privileges (e), in such manner as may be deemed proper."

Act No. 118 of the General Assembly of Arkansas for 1929:

"An Act Providing for the Levying, Collecting and Paying of a Tax on Incomes."

Preamble; Section 3:

"WHEREAS, Agricultural and Industrial development is now being retarded because of a policy to secure practically all of the Revenue from an Ad valorem Tax, thus penalizing and discouraging ownership of property, while many who enjoy the benefits of Government and have large incomes, pay almost nothing to support the Government;

"* * *

"ARTICLE II—IMPOSITION OF TAX.

"SECTION 3. (a) On Individuals.—A tax is hereby imposed upon and with respect to the entire income of every resident, individual, trust or estate, which tax shall be levied, collected and paid annually upon such entire net income as herein computed, at the following rates, after deducting the exemptions provided in this Act; * * *

"(b) On Corporations.—Every corporation organized under the laws of this State shall pay annually an income tax *with respect to carrying on or doing busi-*

ness" (italics ours) "equivalent to two (2%) per cent of the entire net income of such corporation as defined herein, received by such corporation during the income year; * * *

"(c) On Income of Arkansas property of Non-residents.—A like tax is hereby imposed * * * with respect to the entire net income * * * *from all property* owned," (italics ours) "and from every business, trade or occupation carried on in this state by individuals, corporations, partnership, trusts or estates, not residents of the State of Arkansas."

(C) This case was decided by the Supreme Court of Arkansas on the 1st day of April, 1940 (R. —) and petition for rehearing was entertained and overruled on the 13th day of May, 1940 (R. —). The Supreme Court judgment then becoming final, this application for appeal was presented to the Chief Justice of the Supreme Court of Arkansas on the 22nd day of May, 1940 (R. —).

(D) Appellant, Superior Bath House Company, filed its complaint in the Pulaski Chancery Court against Z. M. McCarroll, Commissioner of Revenues for the State of Arkansas, asking for an injunction restraining him from attempting to levy on and sell its property on the Hot Springs National Park Reservation in Garland County, Arkansas, for income tax for the years 1928 to 1938, inclusive, alleged to be due from the operation of a bath house conducted by appellant on said Reservation, where it maintained its office and only place of business. Appellant resisted the payment of the tax which the Commissioner claimed to have accrued since the passage of the Arkansas Income Tax Act in 1929, it being retroactive to embrace the year 1928, on the ground that (a) its sole operation, its only place of business and office was on the Hot Springs National Park Reservation, over which area the State of Arkansas had ceded exclusive jurisdiction to the United

States of America, reserving only the right to tax as personal property, all structures and other property in private ownership within the area, and that the attempted collection of the tax under Act No. 118 of the General Assembly of the State of Arkansas for the year 1929, as amended by Act No. 220 of the Acts of Arkansas for 1931, so far as such income was concerned violated the statutes of the United States and was repugnant to the laws of the United States applicable to the Hot Springs National Park Reservation, and the construction placed on said Acts by the courts of the United States; (b) that Act No. 220 of the Acts of Arkansas for 1931, in exempting corporations from the payment of income tax derived from operations conducted beyond the sovereignty of Arkansas, and the denial to appellant of a like immunity on its income derived solely from operations on the Hot Springs National Park Reservation, over which area the State of Arkansas had ceded and the United States had accepted sole and exclusive sovereign jurisdiction, with the exception of the right accorded the State of Arkansas of "taxation under the authority of the laws of the State of Arkansas applicable to the equal taxation of personal property in that State as personal property, of all structures and other property in private ownership on the Hot Springs Reservation," constituted a denial to appellant of the equal protection accorded it under Amendment XIV to the Constitution of the United States, and was in violation of the prohibition contained in said Amendment; (c) that the action of the Commissioner in threatening to levy on and sell its property located on the United States Government Reservation for income tax alleged to be due on the operations aforesaid did constitute the taking of its property without due process of law, in violation of Amendment V to the Constitution of the United States, and was in violation of the prohibition contained in said Amendment.

The defendant filed a special demurrer to the complaint, and the Chancery Court on the 9th day of February, 1940, decreed that the tax for the years 1929 to 1935, inclusive, was barred by the Arkansas statute of limitations; that the tax for the years 1936 to 1938 was not barred and was collectible. The plaintiff and the defendant each appealed (R. —).

The appeals were duly lodged in the Supreme Court of Arkansas, which is the highest State Court, and it sustained the action of the lower court in holding that the tax for the years 1936 to 1938 on appellant's operations was collectible. It reversed the decree of the lower court and by its judgment held that the tax for the years 1929 to 1935, inclusive, was not barred by the statute of limitations of Arkansas; that Arkansas was not prohibited under the terms of the cession and acceptance Acts relating to the area of appellant's operations from collecting income tax for business conducted within the area; and remanded the cause for the entry of a purely ministerial order dismissing the complaint of the appellant in its entirety.

Petition for rehearing was denied on the 13th day of May, 1940. In its brief to the Supreme Court of Arkansas, appellant set up its claim that the Act and the collection thereunder was repugnant to the statutes of the United States; that it was repugnant and in violation of the compact entered into between the United States and the State of Arkansas respecting sovereignty and jurisdiction over the area involved; that the Arkansas Income Tax Act by its provisions, by the provisions of the Constitution of Arkansas, and under the decisions of the Supreme Court of Arkansas, was not a property tax within the meaning of the terms of the Act of Congress of March 3, 1891 (c. 533, par. 5, 26 Stat. 844); that the levy and collection thereof denied to the plaintiff the equal protection accorded it under Amend-

ment XIV to the Constitution of the United States, and the sale of its property under said levy would constitute the taking thereof without due process of law, inviolation of Amendment V to the Constitution of the United States.

To sustain the jurisdiction of this Court and to reverse this cause, appellant relies on the following cases:

Collins v. *Yosemite Park & Curry Co.*, 304 U. S. 517;
Yellowstone Nat. Park Transportation Co. v. *Gallatin County*, 31 F. (2d) 644;
Ft. Leavenworth Railway Company v. *Lowe*, 114 U. S. 525;
Wachovia Bank & Tr. Co. v. *Daughton*, 272 U. S. 567;
James v. *Dravô Contracting Co.*, 302 U. S. 134;
Arlington Hotel Co. v. *Fant*, 278 U. S. 439;
Williams v. *Arlington Hotel Co.*, 22 F. (2d) 669;
Hot Springs Cases (Historical)—Henry M. Rector v. *U. S.*, 92 U. S. 698;
Hammond v. *Whittridge, Trustee*, 204 U. S. 538;
Ex parte Gaines, 56 Ark. 227;
Fant v. *Arlington Hotel Co.*, 170 Ark. 440;
Arlington Hotel Co. v. *Fant*, 176 Ark. 613;
Surplus Trading Co. v. *Cook*, 281 U. S. 647;
Davies v. *Hot Springs*, 141 Ark. 521, 526;
Buckstaff Bath House Co. v. *McKinley, Commr., etc.*, Oct. term 1939, No. 201, U. S. Sup. Ct., Dec. 18, 1939;
Stanley v. *Gates*, 179 Ark. 886 (Character Arkansas Income Tax);
McCarroll, Commr etc., v. *Gregory-Robinson-Speas, Inc.*, 198 Ark. 235;
Royster Guano Co. v. *Virginia*, 253 U. S. 412.

It is therefore respectfully submitted that this Court has jurisdiction to hear and determine this appeal.

TERRELL MARSHALL,
E. R. PARHAM,
Attorneys for Appellant.

EXHIBIT "A".

SUPERIOR BATH HOUSE COMPANY

v.

MCCARROLL, Commissioner of Revenues

4-5959.

Opinion Delivered April 1, 1940.

Appeal from Pulaski Chancery Court; Frank H. Dodge, Chancellor; affirmed on appeal; reversed on cross-appeal.

GRIFFIN SMITH, *C. J.*:

The suit from which this appeal proceeds was one to enjoin the commissioner of revenues from collecting taxes on incomes for 1928 to and including 1938.[1] A special demurrer was filed on behalf of the commissioner. The complaint was dismissed in respect to taxes for 1936, 1937, and 1938. As to collections sought to be enforced for other years mentioned in the complaint, it was held that by limitation the commissioner had lost his right of action.[2]

Appellant's income is derived from personal services and the use of property on Hot Springs Reservation, in Garland county.[3] It is insisted that exclusive jurisdiction over the Reservation has been ceded to the United States, and that Arkansas reserved only the right to tax, under laws of the state applicable to equal taxation of personal property, the structures erected on leases and other personal property in private ownership.

There is the further contention that act 220 of the Arkansas general assembly, approved March 26, 1931, exempts from payment of the tax domestic corporations doing business entirely without the state, and that act 118 of 1929, "as applied to the appellant in this case, when read in con-

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[1] Act 118, approved March 9, 1929.

[2] Section 26 of act 118, *supra*.

[3] Act 30 of the General Assembly of Arkansas, approved February 21, 1903.

nection with act 220, constitutes an unconstitutional discrimination and classification against the appellant, and denies to it the equal protection accorded under the Fourteenth Amendment,[4] * * * (and is violative of) Art. 2 Sec. 8, of the constitution of Arkansas."

Appellant avers that a return on its income for 1928 was filed in 1929 in a timely manner; that with the return it claimed exemption because operations productive of earnings were conducted under a lease from the Department of the Interior; that the commissioner's ruling was consonant with the claimed exemption, and that no further demand had been made until January, 1939.

By act of March 3, 1891, c. 533, Sec. 5, 26 Stat. 844, U. S. Code Annotated, Title 16, Sec. 365, consent of the United States was given "for the taxation, under the authority of the laws of the State of Arkansas applicable to the equal taxation of personal property in that state, as personal property of all structures and other property in private ownership on the Hot Springs National Park."

By act 30 of the Arkansas general assembly, approved February 21, 1903, exclusive jurisdiction over the Hot Springs Reservation was "ceded and granted" the United States, with the proviso, however, that the act should not prevent the execution of any process of the state, civil or criminal, on any person who may be on such reservation or premises; provided further, that the right to tax all structures and other property in private ownership on the Hot Springs Reservation accorded the state (by act of 1891) is hereby reserved to the state of Arkansas.

Subsequent to approval of act 30, supra, the Congress enacted that "All fugitives from justice taking refuge within (the boundaries of the reservation) shall, on due application to the executive of (Arkansas), whose warrant may lawfully run within said territory for said purpose,

[4] "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

be subject to the laws which apply to fugitives from justice found in the state of Arkansas. Said section shall not be construed as to interfere with the right to tax all structures and other property in private ownership within the boundaries (described), accorded to the state of Arkansas by Sec. 365 of (Title 16, United States Code Annotated).'"[5]

Buckstaff Bath House Company *v.* McKinley, Commissioner,[6] upheld validity of the Arkansas unemployment compensation tax.[7] It was there said that "The tax laid by act 155 is not a tax on personal property; nor is it, in *any* sense, a property tax."

Pollock *v.* Farmers Loan & Trust Company [8] classifies a tax on the income from real and personal property as a direct tax on the property.

Stanley *v.* Gates, 179 Ark. 886, 19 S. W. 2d 1000, holds that the income tax imposed by the act of 1929 is not a property tax. Mr. Justice Hart (later Chief Justice) who wrote the opinion in the Stanley-Gates Case, said: "It has been well said that 'a tax on income is not a tax on property, and a tax on property does not embrace incomes.' Hence, a majority of the court holds that 'property', as the term is used in art. 16, Sec. 5 of the constitution, means the property itself as distinguished from the annual gain or revenue from it."

The Buckstaff Bath House Case was appealed to the Supreme Court of the United States and affirmed.[9] Substance of the opinion, written by Mr. Justice Douglas, is that while the state tax for social security is an excise, it comes within the permission granted by congress to tax personal property on the Hot Springs Reservation. The holding is influenced by the social security act of congress, which the court thought gave Arkansas "implied authority" to levy the tax. Concurrence of Mr. Justice Read is on the ground

[5] U. S. Code Annotated, Title 16, Sec. 372.

[6] 198 Ark. 91, 127 S. W. 2d 802.

[7] Act 155, approved February 26, 1937.

[8] 158 U. S. 601, 617, and 635.

[9] Supreme Court Reporter for January 1, 1940, Vol. 60, No. 4; Law Ed. Advanced Opinions, Vol. 84, No. 4.

that the act of congress of 1891 should be interpreted to give consent to the state to levy the excise for unemployment compensation.

We think there is authority in the general language of the act of 1891 for the state to extend to lessees of personal property on the reservation the tax assessed against all other citizens within the state. Although classified as an excise, our income tax is treated by the courts as having many of the characteristics of a property tax. An excise is not within our constitutional provisions limiting the rate of taxes on property and providing for uniformity.

It would be an anomolous situation indeed if we should say that an excise tax levied for unemployment against those coming within the law's classification included operations within the reservation when authority for its exaction came from a state statute as distinguished from congressional authority, but that a tax on incomes levied uniformly against all citizens could not extend to the reservation because the term "personal property" was used in the act of 1891.

We do not agree with appellant that the reservation, for purposes of taxation, is not within the state. If this theory were correct the Buckstaff Bath House Case was wrong, for act 155 of the Arkansas general assembly could have no extra-territorial effect.

The state is not estopped by action of the commissioner of revenues in 1929. It has often been held that the determination by an administrative agent of the state that an assessment made by law is not to be collected does not affect the right of enforcement. The latest decision directly in point is Southwestern Distilled Products Company, Inc *v.* State, ex rel. Humphrey, Vol. 72, No. 3, Law Reporter for January 29, 1940. The instant case is unlike State, ex rel. Attorney General *v.* New York Life Insurance Company,[10] where Sec. 13899 of Pope's Digest was held to apply. There the insurance company had declared all premiums upon which a report was required.

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[10] 198 Ark. 820, 131 S. W. 2d 639.

In the case at bar appellant, in its report, urged its exemption, and when the commissioner (acting, of course, in good faith) concluded the petitioner was not subject to the tax, no report was made for any of the succeeding six years. Appellant is not subject to the tax for 1928, but will be required to pay for all unreported years.

The decree is affirmed on appeal, and reversed on cross-appeal. The cause is remanded for further proceedings under the law as here declared.

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Supreme Court of the United States

OCTOBER TERM, 1940

No. 180

SUPERIOR BATH HOUSE COMPANY, ... *Appellant*,

v.

Z. M. McCARROLL, COMMISSIONER OF REVENUES FOR THE STATE OF ARKANSAS, ... *Appellee*.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF FOR APPELLANT

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APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF FOR APPELLANT

OPINION OF THE SUPREME COURT OF ARKANSAS

The opinion of the Supreme Court of Arkansas has not appeared in the bound volumes of the reports of that Court. It will be found in Arkansas Law Reporter, Vol. 72, No. 12, page 795, delivered April 1, 1940, and 139 South Western 2d 378.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The grounds on which the jurisdiction of this Court is invoked have been set out in the statement as to jurisdiction heretofore filed by appellant in compliance with

section 1 of Rule 12, namely, that the Supreme Court of Arkansas erred in holding that Act No. 118 of the General Assembly of Arkansas for the year 1929, as amended by Act No. 220 for the year 1931, which are the Arkansas Income Tax Acts, applied to the operation and business of appellant, which was confined solely to the Hot Springs National Park Reservation, where it maintained its one and only office and one and only place of business, in that jurisdiction over the area had been ceded to the United States by the State of Arkansas under Act No. 30 of the General Assembly of 1903 and accepted by the Act of Congress of April 20, 1904. It was claimed that the opinion was in error in holding that the State of Arkansas reserved the right to tax the income of appellant corporation on its business conducted within the Reservation, under the taxing power extended the State of Arkansas by Acts of Congress of March 3, 1891, and April 20, 1904; that the Arkansas Income Tax Act, as defined by the Legislature of the State of Arkansas and construed by the Supreme Court of Arkansas, was a property tax within the meaning of the Acts of Congress of March 3, 1891, and April 20, 1904; that the exemption extended corporations from the payment of tax on income derived extra-territorially, and denial to appellant of a like exemption did not offend the equal protection accorded it under Amendment XIV to the Constitution of the United States; that the threatened levy on and sale of its property located on the United States Government Reservation for its income so derived, did not constitute the taking of its property without due process of law, in violation of Amendment V to the Constitution of the United States; and that the opinion construing said acts was repugnant to the laws of the United States applicable to the Hot Springs National Park Reservation, limiting the

State of Arkansas to taxation of personal property under the compact entered into between the United States of America and the State of Arkansas respecting jurisdiction, as reflected by said Acts (R. 26-27-28).

STATEMENT OF THE CASE

Act No. 118 of the General Assembly of Arkansas for 1929, imposed an annual tax on corporations organized under the laws of the State of Arkansas equivalent to 2% of the entire net income of such corporation, "with respect to carrying on or doing business by the corporation", for and subsequent to the year 1928. Within the time prescribed by said Act, and during the year 1929, the appellant prepared and submitted an income tax return for the year 1928, and filed the same with the Commissioner of Revenues of the State of Arkansas (R. 4), under which it made the claim that it was exempt from taxation of its income derived from its operations confined solely to the Hot Springs National Park. The return was accepted by the Commissioner of Revenues, whose rule departmentally affirmed appellant's claim of exemption from the imposition of the said tax. No subsequent return was tendered by appellant, and no demand was made on it for the payment of the tax by any succeeding Commissioner of Revenues until on or about the 18th day of January, 1939, when the defendant, Z. M. McCarroll, as Commissioner, being charged with the administration and enforcement of said Act, assessed and attempted to collect the same on appellant's income for the years 1928 to 1938, inclusive.

Appellant applied to the Pulaski Chancery Court on petition to restrain its collection, alleging, among other things, that its only office and business was located in the Hot Springs National Park (R. 2); that exclusive jurisdic-

tion over the area of appellant's operations had been ceded to the United States, reserving only the right to tax structures and property in private ownership thereon, under the laws of the State of Arkansas applicable to the equal taxation of personal property (R. 3); that the United States had accepted the cession of the area and exercised sovereignty over the lands at all times since the grant by the State of Arkansas, with the exception of the right to tax as extended by the Act of Congress of March 3, 1891 (R. 3); that Act No. 220 of the Acts of Arkansas for 1931 exempted Arkansas corporations from the payment of tax on income derived from business outside the State, and it, taken in consideration with Act No. 118 of Arkansas for 1929, rendered the act of the Commissioner in attempting to levy and collect the tax, an unconstitutional discrimination and classification, by reason of which appellant was denied the equal protection accorded it under Amendment XIV to the Constitution of the United States, and that the threatened sale would constitute the taking of its property without due process of law, in violation of Amendment V to the Constitution of the United States (R. 4); that the act of the Commissioner in his construction, and the application of said Act No. 118 of Arkansas for 1929, to plaintiff's operations, was repugnant to the Acts of Congress and the construction placed on said acts by the courts of the United States (R. 4). To said petition a special demurrer was filed, and the Chancery Court dismissed the petition without opinion, for want of equity with respect to the taxes for the years 1936 to 1938, inclusive. With respect to prior years, the petition was granted by reason of the bar of the Arkansas statute of limitations (R. 14).

Appellant and appellee appealed to the Supreme Court of Arkansas, which is the highest State Court, and there on

the 1st day of April, 1940, the order of the Pulaski Chancery Court was affirmed as to the liability for income tax for the years 1936 to 1938, inclusive. It was reversed with respect to the tax for the years 1929 to 1935, inclusive, holding that this period was not barred by the Arkansas statute of limitations, but that on the basis of the return for the year 1928, which was made in 1929, a bar existed as to that year (R. 15). Within the time allowed by law, a petition for rehearing was filed, and by order of the Court denied on the 13th day of May, 1940 (R. 20-22), the judgment at that time becoming final. Application was made to the Honorable Griffin Smith, Chief Justice of the Supreme Court of Arkansas, for an appeal to this Court, which was granted, and on which, on the 14th day of October, 1940, this Court noted probable jurisdiction (R. 25).

SPECIFICATION OF ASSIGNED ERRORS TO BE URGED

Appellant's assignment of errors was incorporated with its petition for appeal to this Court and prayer for reversal. The errors assigned appear on pages 27 and 28 of the Record. The five assignments are interrelated and bear directly upon the question as to whether or not appellant's income, derived solely from the maintenance of its only office and the conduct of its sole business on the Hot Springs Reservation, could be taxed under Act No. 118 of the Acts of Arkansas for 1929, as amended by Act No. 220 of 1931. This in view of the fact that jurisdiction of that area had been ceded to the United States by Act No. 30 of Arkansas for 1903, reserving only the right to tax all structures and other property in private ownership on the Hot Springs Reservation accorded the State by Act of Congress of March 3, 1891 (26 Stat. 844), which Act of March 3,

1891, extended to the State the right to tax "under the authority of the laws of the State of Arkansas applicable to equal taxation of personal property in that State, as personal property, of all structures and other property in private ownership on the Hot Springs Reservation", which cession was accepted by Act of Congress of April 20, 1904 (c. 14, par. 1, 33 Stat. 187), embracing by reference the provisions of the Act of March 3, 1891, *supra,* relative to taxation. Further, that since Act No. 220 of Arkansas for 1931 exempts from taxation corporate income which is derived from operations conducted beyond the sovereignty of the State, the failure to extend a like immunity to appellant's operations constitutes a denial to it of the equal protection accorded under Amendment XIV to the Constitution of the United States, and the levy on its property for such income constitutes the taking of its property without due process, in violation of Amendment V to the Constitution of the United States.

Our argument will be based on all of the assignments of errors, and they are as follows:

The Supreme Court of Arkansas erred in holding and deciding:

I.

That Act No. 118 of the Acts of Arkansas for 1929, as amended by Act No. 220 of the Acts of Arkansas for 1931, in taxing appellant's income, did not constitute an unconstitutional discrimination and classification, denying to appellant the equal protection accorded it under Amendment XIV to the Constitution of the United States and that the tax so levied was not in violation of the prohibition contained in said Amendment.

II.

In failing to hold and decide that the levy and sale of its property located on said United States Government Reservation for income tax under the provisions of Act No. 118 of Arkansas for 1929, as amended by Act No. 220 of Arkansas for 1931, resulting from business conducted solely thereon, constituted the taking of its property without due process of law, in violation of Amendment V to the Constitution of the United States.

III.

That Act No. 30 of the General Assembly of Arkansas for the year 1903 reserved to the State of Arkansas the right to tax appellant's income arising from operations conducted solely on the Hot Springs National Park Reservation.

IV.

That the Act of Congress of March 3, 1891 (c. 533, par. 5, 26 Stat. 844), and the Act of Congress of April 20, 1904 (33 Stat. 187, 16 USCA, paragraphs 372-383) by extending to the State of Arkansas the right to tax as personal property all structures and other property in private ownership on the Hot Springs National Park Reservation, authorized the taxation of appellant's income under the provisions of Act No. 118 of Arkansas for 1929, as amended by Act No. 220 of Arkansas for 1931.

V.

That by the compact entered into between the United States of America and the State of Arkansas respecting sovereignty and jurisdiction of the area embraced in the Hot Springs National Park, as reflected by Acts of Congress of April 20, 1832, 4 Stat. at L. 505, par. 3; December 16,

1878, c. 5, 20 Stat. 258; March 3, 1891, c. 533, par. 5, 26 Stat. 844; and April 20, 1904, c. 1400, par. 1, 33 Stat. 187; and Act No. 30 of the General Assembly of the State of Arkansas for 1903, the State of Arkansas was not limited to taxation, as personal property, of structures and personal property in said area.

SUMMARY OF POINTS AND AUTHORITIES

I.

The area embraced in the Hot Springs National Park Reservation is not a part of the State of Arkansas and is completely beyond its jurisdiction, with the sole exception of the right to tax as personal property the buildings and structures thereon and the personal property of individuals situated in the area.

Arlington Hotel Co. v. *Fant*, 278 U. S. 439.

Collins v. *Yosemite Park & Currie Co.*, 304 U. S. 517.

Ft. Leavenworth Ry. Co. v. *Lowe*, 114 U. S. 525.

Hot Springs Cases—Rector v. *U. S.*, 92 U. S. 698.

James v. *Dravo Contracting Co.*, 302 U. S. 134.

Williams v. *Arlington Hotel Co.*, 22 F. (2d) 669.

Yellowstone National Park Transportation Co. v. *Gallatin County*, 31 F. (2d) 644.

Ex Parte Gaines, 56 Ark. 227.

Surplus Trading Co. v. *Cook*, 281 U. S. 647.

Buckstaff Bath House Co. v. *McKinley, Commissioner*, No. 201 Oct. Term 1939; U. S. Supreme Court Advance Opinions (Law Ed.) Vol. 84 No. 4, page 242.

Fant v. *Arlington Hotel Co.*, 170 Ark. 440.

Arlington Hotel Co. v. *Fant*, 176 Ark. 613.

Buckstaff Bath House Co. v. *McKinley, Commissioner,* 198 Ark. 91.

II.

The Income Tax Act of Arkansas (Act No. 118 of 1929) is not a property tax within the meaning of the reservation of taxing authority by the State in its cession of exclusive jurisdiction of the Hot Springs Reservation.

Stanley v. *Gates,* 179 Ark. 886.

Baker v. *Hill,* 180 Ark. 387.

Davies v. *Hot Springs,* 141 Ark. 521.

Henneford v. *Silas Mason Co.,* 300 U. S. 577.

Chattanooga & St. L. Ry. v. *Wallace,* 288 U. S. 249.

III.

The State is precluded from collecting an income tax on the privilege of conducting business in a place beyond its sovereignty.

James v. *Dravo Contracting Co.,* 302 U. S. 134.

IV.

Compacts entered into between States and the United States on the surrender of sovereignty over lands lying within the boundaries of the State are to be construed in the same manner as ordinary contracts between individuals, with a strict construction against neither.

Collins v. *Yosemite Park & Currie Co.,* 304 U. S. 517.

James v. *Dravo Contracting Co.,* 302 U. S. 134.

Merchants Transfer & Whse. Co., v. *Gates,* 180 Ark. 97.

V.

The exemption extended corporations from the payment of income tax on operations conducted beyond the sovereignty of

Arkansas and the imposition of a tax under a like situation on appellant's income constitutes a denial to it of the equal protection afforded it under Amendment XIV to the Constitution of the United States, and the sale of its property for such tax would constitute the taking of its property without due process of law, in violation of Amendment V to the Constitution of the United States.

McCarroll, Commr., v. *Gregory-Robinson-Speas, Inc.,* 198 Ark. 235.

Royster-Guano Co. v. *Virginia,* 253 U. S. 412.

ARGUMENT

The undisputed facts are that appellant's sole business is the operation of a bath house located on the Hot Springs National Park Reservation, and that it maintains no office except on the Reservation, from which operation it derives all of its income. The primary question, therefore, to be determined is whether or not the State of Arkansas, having ceded exclusive jurisdiction over the Hot Springs National Park Reservation, retained the right to levy income tax under taxing powers reserved in the grant for "taxation under the authority of the laws of the State of Arkansas applicable to the equal taxation of personal property * * * as personal property, of all structures and other property in private ownership on the Hot Springs Reservation"; is the Arkansas income tax as enacted by the Legislature and as defined by the Supreme Court of Arkansas, such a tax as comes within this definition or description.

It cannot reasonably be contended that sovereignty over this area has not been surrendered by the State, with the exception of this taxing reservation, and undoubtedly the United States can accept such sovereignty over lands within the borders of a State for public purposes. Secondly, if the Arkansas income tax is not such a tax as is embraced

in the wording of the clause reserving taxing power in the State of Arkansas, does the fact that the State exempts other corporations organized under its laws from the payment of income tax on earnings beyond its sovereignty, and the imposition of the tax on appellant constitute the denial to it of the equal protection afforded it under Amendment XIV to the Constitution of the United States, and does the sale of its property for the tax constitute the taking of its property without due process of law, in violation of Amendment V to the Constitution of the United States?

I.

The area embraced in the Hot Springs National Park Reservation is not a part of the State of Arkansas, and is completely beyond its jurisdiction, with the sole exception of the right to tax, as personal property, the buildings and structures thereon and the personal property of individuals situated within the area.

In support of this proposition, we wish to briefly discuss the status of lands held within the physical boundaries of the States by the United States and particularly the history of the Hot Springs National Park Reservation. Lands may be held within the physical boundaries of the States by the United States under three general classifications, the first being those lands which the United States owns, that is, which had not been conveyed by grant, patent, or otherwise, to individuals at the time of the admission of the State to the Union and which had not been dedicated or appropriated to public use; second, those lands acquired by purchase under authority of Article I, Section 8, of the Constitution of the United States, for the erection of forts, magazines, arsenals, dock yards and other needful buildings; and, third, those acquired by cession from the States for governmental purposes, projects and general public use.

The rights of the States in connection with these lands are determined by the particular classification. In the first instance, namely, those lands to which the United States had title at the time of the admission to the Union, the State has complete sovereignty, subject only to the proprietary interest of the United States. The only qualification of its sovereignty is that these lands cannot be taxed while in the ownership of the United States, but the laws of the State, civil or criminal, are applicable to individuals residing on these lands, their property located thereon, and acts there committed. Any interest in these lands which an individual might acquire by lease or otherwise is also subject to taxation by reason of the sovereignty of the State. The Constitution of the United States did not contemplate that the confederation formed under it would hold crown lands as a monarchy for the purpose of deriving revenue, but that all lands which it became the owner of, not put to public use under the two latter classifications, would find their way into private ownership.

Exclusive sovereignty is vested in the United States over lands acquired under the provisions of Article I, Section 8, of the Constitution of the United States, which extends to the area acquired by the United States, regardless of whether or not a portion of the area might be put to some use other than the public purpose. In other words, sovereignty, having passed to the United States, does not revert to the State on the conveyance of an interest in the land by the United States to an individual. A like situation, with regard to sovereignty, exists over lands acquired by the United States for public purposes by act of cession from the States, with the exception that the States may reserve rights not inconsistent with the governmental pur-

pose, but all rights and all sovereignty except that saved passes to the United States.

The area under consideration partakes of the character of governmental lands acquired under Article I, Section 8, of the Constitution of the United States, and those acquired by cession of the State. It so happens that the United States had the proprietary interest in the lands prior to their dedication to public use. It could have, lacking that proprietary interest, purchased the same, with the consent of the Legislature under the provisions of Article I, Section 8, of the Constitution, for there is no question of the authority of the United States to engage upon such a project.

All lands in Arkansas were acquired by the United States under the Louisiana Purchase from France in 1803, and from 1803 to 1836 it was sovereign and proprietor of the area. Of course, it recognized the rights of individuals acquired in the lands from former sovereigns prior to 1803 under the settled policy and law of the United States relating to lands obtained by cession, purchase or conquest, so long as the rights were not inconsistent with the laws of the United States. During territorial days the United States parted with its proprietary interest in much of the area. At the time of the Louisiana Purchase the Hot Springs area was claimed by the Quapaw Indians, with whom the United States made a treaty surrendering their claim in 1818. These springs were regarded from the earliest times as highly beneficial to health, and were mentioned as remarkable by President Jefferson in his message to Congress, and from the very beginning the United States intended to dedicate them and the area to the general public and to retain sovereignty and control over them for that purpose, after the expiration of the Quapaw treaty.

In accordance with this purpose, Congress, on April 20, 1832, passed an act as follows:

> "The hot springs in said territory, together with four sections of land including said springs, as near the center thereof as may be, shall be reserved to the future disposal of the United States, and shall not be entered, located or appropriated for any purpose whatever." 4 Stat. at L. 505, par. 3.

Arkansas was admitted to the Union in 1836, but the act of admission neglected to make reservation of the sovereignty of the United States to protect the dedication which it had made of these lands under the Act of Congress of April 20, 1832, which evidently was an oversight, because Congress continued to legislate with respect to the subject in a sovereign capacity, as distinguished from a proprietary interest, as late as March 3, 1891. This is clearly indicated by the fact that on December 16, 1878, Congress passed an act containing the following:

> "Provided, that all titles given or to be given by the United States shall explicitly exclude the right to the purchaser of the land, his heirs or assigns, from forever boring thereon for hot water, and the hot springs, with the reservation and mountain, are hereby dedicated to the United States and shall remain forever free from sale or alienation." 20 Stat. 258, c. 5.

On March 3, 1891, Congress passed the following act:

> "The consent of the United States is hereby given for the taxation under the authority of the laws of the State of Arkansas applicable to the equal taxation of personal property in that State as personal property, of all structures and other property in private ownership on the Hot Springs Reservation." 26 Stat. 844, c. 533, par. 5.

It is apparent that Congress was under the impression that its Act of April 20, 1832, dedicating this area, became a part of the act of admission of Arkansas to statehood, and operated to reserve sovereignty over the area in the United States, just as effectively as it without doubt could have done if the reservation had been made in the act of admission, for any other conclusion would render the Act of March 3, 1891, a meaningless gesture.

If, therefore, the Act of Congress of April 20, 1832, did not become a part of the act of admission to statehood, which we will concede and which fact has since been judicially determined, then this situation follows: After the act of admission of Arkansas in 1836, the State became the sovereign, and the United States held only the proprietary interest in lands in the State which it had not disposed of in any of the various methods so well known to the Court. Of course, the State was prohibited from taxing this proprietary interest, but it thereafter had full authority to tax all property of individuals on the lands of the United States and to tax any interest acquired by lease or otherwise in these lands so long as the proprietary interest of the United States was not taxed. The State had the full and complete power and sovereignty to tax any enterprise, any activity, any business or any occupation engaged in on those lands of which the United States was only the proprietor. All laws of the State of Arkansas, both civil and criminal, applied to the acts of individuals done or committed on the lands.

It appears, therefore, that Congress, by its Act of March 3, 1891, purported to extend to the State of Arkansas certain well defined but limited rights of taxation, which the State of Arkansas already possessed. It is, however, an inescapable conclusion that Congress thought otherwise,

which is the sole reason for the passage of the acts of cession and acceptance to be hereafter discussed, and which were enacted for the purpose of adjusting this controversy by mutual compact, concerning which compacts this Court has held:

> "The states of the Union and the National Government may make mutually satisfactory arrangements as to jurisdiction of territory within their borders * * *. It is a matter of arrangement. These arrangements the courts will recognize and respect." *Collins v. Yosemite Park & Currie Co.*, 304 U. S. 517, 528.

The Supreme Court of Arkansas, on the 21st day of May, 1892, decided the case of *Ex Parte Gaines*, 56 Ark. 227, in which was involved the right of the State to tax the leasehold interest of an individual acquired in a portion of the land embraced in the Hot Springs National Park Reservation. This was more than one year after the passage of the Act of Congress of March 3, 1891. The Court held that the leasehold interest, being an interest with which the United States had parted, was taxable, since it constituted property in the hands of an individual.

The leasehold interest was taxable because sovereignty over the lands passed to the State of Arkansas by the act of admission to statehood, but not by virtue of any right of taxation acquired under Act of Congress of March 3, 1891. Congress had no right of taxation, so far as individuals were concerned, to extend. However, if it had had taxation privileges to extend, the wording of the act would not have embraced a leasehold interest, for it is apparent that an attempt was being made by that act to sever the building on the lease from the soil and to convert it to personal property for taxation as personal property, in opposition to any interest in land, and the Act of Congress was not

discussed by the Supreme Court of Arkansas in that relationship, but solely from the standpoint of the conflict which might arise between the purchaser at the tax sale and the Secretary of the Interior over the change in ownership brought about by the sale. The Court said in its opinion at page 231:

> "But the Act of Congress, which was passed since the assessment and levy of the taxes in dispute, assenting to taxation by the State of all structures and other property in private ownership on the reservation, relieves the State and the purchaser at the tax sale of any embarrassment that might arise on that score."

From the time of this decision until the 21st of February, 1903, operations were conducted in this area under taxation rights in accordance with the ruling in the Gaines case, which evidently were unsatisfactory to the Department of the Interior, since in that year the Legislature of the State of Arkansas passed Act No. 30, ceding exclusive jurisdiction over a part of the Hot Springs Reservation described by metes and bounds, on which the springs were located and on which appellant maintains its office and place of business, reserving the limited right of taxation heretofore quoted. We wish to call the Court's particular attention to the fact that originally the United States dedicated four sections of land, including the springs, to public purposes and that the compact between the United States and the State of Arkansas represented by the Act No. 30 of Arkansas of 1903 and the Act of Congress of April 20, 1904, respecting sovereignty, applied to a very small portion of the original tract of land, on which was located the Arlington Hotel, the bath houses, the hot springs themselves, and the Army & Navy Hospital.

Congress, in accepting cession of this limited area, set up a complete system for its administration, provided the laws that should be applicable to it, and established a judicial system for their enforcement, designating the United States District Court for the Eastern District of Arkansas. The limited area ceased to be a part of the State.

The effect of the acts of cession and acceptance was to change the rights of sovereignty of the parties that existed at the time of the decision in the case of *Ex Parte Gaines,* which status was measured from the time of admission of the State of Arkansas in 1936, and to make the United States again the sovereign and the proprietor over the lands in question, as it was from 1803 to 1836, with the exception of the limited right of taxation which the State acquired under the compact. Certainly on the part of the State of Arkansas a change in sovereignty was contemplated, together with a restriction of its taxing rights with reference to property of individuals on the reservation or any interest in the lands with which the United States had parted. The interest of the United States could not have been taxed in any manner, and the subject of taxation could not have been addressed to any but individuals. The Gaines case had held that all property rights of every nature of these individuals on the Reservation could be taxed. It naturally follows that a restriction of taxing right on the part of the State was contemplated, and thereafter taxation could be exercised by the State, so far as individuals were concerned, only to a limited degree and not generally. On this subject the Supreme Court of Arkansas held in the case of *Merchants Transfer & Whse. Co.* v. *Gates,* 180 Ark. 96, at page 102:

"It is a fundamental rule of construction that the Legislature is presumed to have enacted a statute in

the light of all judicial decisions relating to the same subject."

The decisions of this Court from *Ft. Leavenworth Ry. Co.* v. Lowe, 113 U. S. 525, to *Collins* v. *Yosemite Park & Currie Co.,* 304 U. S. 517, uniformly hold that sovereignty vests in the United States over lands acquired within the boundaries of the States, whether by cession or by purchase under Article I, Section 8, of the Constitution subject only to the particular rights reserved by the State in the act of cession or general enabling act; that the reservation so made would be invalid if it interfered with the use of the United States in the case of lands acquired by purchase under the constitutional provision. The only doubt which the Court has ever expressed is not on the question of the right to acquire sovereignty on the part of the United States, but on the question of the invalidity of any reservation by the State in either instance.

Since the decisions of this Court in the cases of *James* v. *Dravo Contracting Co.,* 302 U. S. 134, and *Collins* v. *Yosemite Park & Currie Co.,* 304 U. S. 517, apparently lands purchased under Article I, Section 8, and lands acquired by cession, as relating to sovereignty, are on the same basis, that is, all sovereignty passes to the United States in the absence of a reservation and the State retains only the specific rights named in the grant or enabling act in either classification.

The case of *Ft. Leavenworth Ry. Co.* v. *Lowe, supra,* recognizes the principle that the United States can acquire exclusive sovereignty over lands within the physical boundaries of a State, that is, the lands on cession cease to be a part of that State and remain so even though a part is later put to private use by the United States. At page 541 of that opinion the Court said:

> "As instrumentalities for the execution of the powers of the general government, they are, as already said, exempt from such control of the States as would defeat or impair their uses for these purposes; and if to their more effective use a cession of legislative authority and political jurisdiction by the State would be desirable, we do not perceive any objection to its grant by the legislature of the State."

That very grant was later made by the Legislature of the State of Kansas over the lands which had the identical status of those involved in this case.

This Court held in the case of *Arlington Hotel Co.* v. *Fant*, 278 U. S. 439, that acts of the Legislature of the State of Arkansas passed subsequently to the cession in 1903, had no effect and were inoperative on the Reservation, which plainly demonstrates that the Reservation ceased to be a part of the State—it became extra-territorial. At the most, Arkansas had reserved a taxing easement which could not be enlarged upon by subsequent act of the State Legislature. It was fixed by the terms and as of the date of the compact. The Arkansas Income Tax Act was passed many years after the area had ceased to be a part of Arkansas. We will enlarge upon this statement in subsequent portions of this argument dealing with the nature and validity of the taxing easement which the State in fact reserved, since we are endeavoring to confine this portion solely to sovereignty.

In *Williams* v. *Arlington Hotel Co.*, 22 F. (2d) 669, the same question was involved as in *Arlington Hotel Co.* v. *Fant*, with the exception that in the lower court the contention was made that the portion of the ceded area occupied by the Arlington Hotel was not in Government use, and therefore subject to the laws of Arkansas enacted sub-

sequent to the cession in 1903. The Circuit Court of Appeals rejected this contention, holding that complete sovereignty of the area had been surrendered and that the laws of Arkansas had no application thereon after cession, regardless of the use to which the lands had been put.

In the case of *Yellowstone Park Transportation Co.* v. *Gallatin County,* 31 F. (2d) 644, citing *Ft. Leavenworth Ry. Co.* v. *Lowe,* and *Arlington Hotel Co.* v. *Fant,* the Court said, at page 645:

> "In other words, after the date of cession the ceded territory was as much without the jurisdiction of the State making the cession as was any other foreign territory except insofar as jurisdiction was *expressly reserved.*" (Italics ours.)

The Supreme Court of Arkansas, in the interrelated opinions of *Fant* v *Arlington Hotel Co.,* 170 Ark. 440, and *Arlington Hotel Co.* v. *Fant,* 176 Ark. 613, also determined that the area embraced in the Hot Springs National Park Reservation was beyond the sovereignty of Arkansas; that the only reason the courts of this State could take jurisdiction of a cause of action arising on the Reservation was on account of its transitory nature, but which cause of necessity had to be determined by the laws of the Reservation and not the laws of Arkansas, and while the laws of Arkansas existing prior to cession remained in effect in that area, nevertheless it was because of the policy of the United States to retain laws in ceded areas so long as the same were not inconsistent with its own, but these laws of Arkansas prior to cession became United States laws and not State acts; in short, that this was a foreign area just like any other State or territory.

In the case of *Surplus Trading Co.* v. *Cook,* 281 U. S. 647, this Court denied Pulaski County, in which the Camp

Pike area was located, the right to tax property of individuals located on the Reservation, and while it is true that this area was purchased under Article I, Section 8, of the Constitution, nevertheless the same character of sovereignty is obtained as in the case of cession. The only difference between the Arkansas act extending permission to purchase for public purposes and the act of cession of the Hot Springs Reservation, is that one reserved certain rights of taxation and the other was free of restrictions. The acts were passed at the same session of the Legislature and were a part of the general plan of the United States throughout the Nation to secure more definite agreements from the States relating to the lands in their physical boundaries which were devoted to public purposes.

The Court went into the question of sovereignty at length in that case and quoted with approval prior decisions holding that residents of these areas did not have political privileges in the States in which they were located; they were not citizens of those States; they were not bound by any of its laws, civil or criminal, and consequently did not have the benefit of the protection of the laws of the State.

The last court expression that we have been able to find on this subject is that of this Court in the Collins case, 304 U. S., at page 533:

> "As the State of California has in the area of the Yosemite National Park only the jurisdiction saved under the cession and acceptance acts of 1919 and 1920, it does not have the power to regulate the liquor traffic in the Park. Except as to this reserved jurisdiction, California 'put that area beyond the field of operation of her laws'."

There is not one single decision to the contrary, and if income tax is not included within the plain wording of

the reservation of the right to tax retained in the act of cession of 1903, which embraced and incorporated the wording of Act of Congress of March 3, 1891, we maintain it cannot be levied under the authority of that Act on income derived from business conducted on the Hot Springs Reservation. The Act itself says "*exclusive jurisdiction*" is ceded. The act of acceptance by Congress says "*sole and exclusive jurisdiction*" is accepted; and we therefore believe that we have sustained our contention that this area is, as stated by the Court in the case of *Yellowstone Park Transportation Co.* v. *Gallatin County, supra,* "as much without the jurisdiction of the State * * * as any other foreign territory."

The State of Arkansas reserved the right to tax the buildings and structures on the leasehold estates as personal property, and tangible personal property of individuals on the Reservation, and nothing else.

All of the opinions of the Court have been to the effect that these compacts and agreements are to be construed according to the ordinary meaning of their terms in the light of attendant circumstances, and under that rule we shall attempt to analyze the provisions of the particular taxing reservation in this case.

If the State of Arkansas had sovereignty and general taxing power over this area from the date of its admission to the Union in 1836, so far as property, franchises or rights of individuals within the area were concerned, and the Supreme Court of Arkansas had so held, even to the extent of the leasehold interest, with which the United States had parted, it necessarily follows that it intended to surrender some part of that taxing power along with its avowed intention to cede exclusive jurisdiction. The nature of the taxing right surrendered therefore can be found by

construction of the provisions of the various acts on the subject in accordance with existing law and prior court decisions bearing on that question. This is a fundamental rule of statutory construction.

Act No. 30 of Arkansas of 1903 adopted the specific wording of the Act of Congress of March 3, 1891, and reserved the right to tax "all structures and other property in private ownership" * * * "accorded the State by the Act of Congress March 3, 1901" (1891). The word "structures" needs no interpretation. The word "property" may need construction, but the very act itself attempted to supply that construction, for just preceding its use the specific reference is made to taxation under the laws "applicable to equal taxation of personal property" in the Act of Congress March 3, 1891 which phrase, by adoption is a part of Act 30 of Arkansas for 1903. This characterization of property eliminates all franchise tax, income tax, use tax and excise tax of any nature, and that is exactly what the contracting parties were attempting to do, for the uniform personal property tax was well known to the parties and did not constitute any interference with the promotion by the Department of the Interior of the hot springs for public use. Any other tax might or might not have interfered with that promotion, and in order to avoid the possibility of interference the reservation was limited to this distinct and well defined species of tax. It is absolutely certain that the grant precluded the taxation of the leasehold interest which the State had the right to tax at the time of the decision in the Gaines case, *supra,* and substituted the structure separated from the freehold in its place, which structure ceased to be carried on the real estate assessment books and was carried over to the personal property books of the County Collector, so that if a

different rate of taxation should be adopted for real estate and personal property, the latter would fix its rate of taxation.

If the Act itself were not plain enough, there is still another absolute guide to an interpretation showing that only the right to tax tangible personal property was reserved, for at this time Article XVI, paragraph 5, of the Constitution of Arkansas of 1874 specifically defined the subjects of taxation. That section provided for *equal* and *uniform* taxation of real and personal property, that is, tangible personal property; and in addition the Legislature was permitted to tax in such manner as it deemed proper hawkers, peddlers, ferries, exhibitions and privileges. There is no provision for uniformity of taxation according to value of this latter class of taxation, and of course it was not intended to be reserved to the State for taxation in the Act of cession of 1903.

The Congress and the Legislature had in mind the taxing power which the Constitution of Arkansas gave to its Legislature, and these acts were drafted with reference to it. But if the parties to the contract did not in fact have in mind this provision of the Arkansas Constitution in framing these reciprocal acts, still the courts would have attributed this knowledge to them, because it is a fundamental rule of construction that the act of the Legislature is to be construed in ascertaining its meaning with reference to, first, all prior acts on the same subject, and this would include Acts of Congress as well as the Legislature, and, second, all judicial decisions on the subject, certainly the provisions of the Arkansas Constitution relative to taxation are imputed to the legislative mind; especially is this so when words are used that have a well defined legal meaning.

Any other construction of the wording of this taxing reservation would place the situation right back as it was at the time of the decision in the Gaines case and before the passage of Act No. 30 of Arkansas of 1903, and would nullify the effect of that Act and the Act of Congress of April 20, 1904.

We contend that the foregoing propositions of legal construction which we have advanced have not been changed in any wise by the Court's decision in the cases of *James* v. *Dravo Contracting Co.*, 302 U. S. 134; *Collins* v. *Yosemite Park & Currie Co.*, 304 U. S. 517; and *Buckstaff Bath House Co.* v. *McKinley, Commissioner,* Advance Opinions (Law Ed.) Vol. 84, No. 4, page 242, for in the first the reservation was "concurrent jurisdiction retained for taxation not in conflict with or a burden on the federal purposes." In the Collins case the right to tax which was reserved was that of every tax known to the law applicable to persons and corporations, their franchises and property, unqualified by any provision for relieving a burden on the federal purposes. Apparently, therefore, this Court's construction of those two taxing reservations sheds little or no light on the meaning of the particular reservation in question. The gist of the decision in the Collins case, it appears to us, is that a license is not a tax, and consequently that provision of the California Alcoholic Beverage Control Act had no effect within the Reservation, because although all taxing right had been reserved, sovereignty over the area had been surrendered.

The basis of the decision of the Supreme Court of Arkansas in the case of *Buckstaff Bath House Co.* v. *McKinley, Commissioner,* 198 Ark. 91, was that the State, having the right to tax personal property under the taxing power in question, resultantly had the right to tax the use of that

property. However, we do not believe this Court, in passing on the appeal in that case, adopted a like construction or decided that the right of taxation for social security contributions inured to the State by reason of the reservation in Act No. 30 of Arkansas for 1903. We take it that the decision, in short, held that the United States under a general law taxed for a similar purpose persons occupying the status of the Bath House Company and that the taxing act of the United States impliedly intended that the States would tax the same classes, since all was a part of a coordinated plan under which the State acts were to be reciprocal to and integrated with the national Social Security Act. The Court said, in the last paragraph of the opinion:

> "The implied authority which we here find to exist" (given under the national Social Security Act) "is therefore used not to override an earlier express authority but merely to extend it to a degree."

If the State had the right to tax under the construction of the provision of Act No. 30 of Arkansas for 1903, then it needed no implied extension of authority by the national Social Security Act, and conversely the only logical conclusion which follows is that the right to tax the use of property was not included in the original reservation, or there would have been no necessity for extension. But for the implied extension of authority to tax in a subsequent Act of Congress, it did not exist, because without this implied authority—this implied invitation to tax—the laws of Arkansas could have no force and effect on the Hot Springs Reservation.

The Income Tax Act of Arkansas bears no relationship to any federal act on the subject, and consequently we believe that we have shown by the foregoing that it is not that character of a tangible personal property tax

within the meaning of the reserved power to the State of Arkansas.

Equal taxation of personal property is a simple statement; it in fact ought not to require the aid of anything else for i's construction. It is the class of property in private ownership over which the State reserved taxing power.

II.

The income tax of Arkansas is not a property tax within the meaning of the reservation of a taxing authority by the State in its cession of exclusive jurisdiction of the Hot Springs Reservation.

The Supreme Court of Arkansas has based its decision in the present case squarely on the proposition that the State's authority for levying the income tax is embraced in the provisions of the Act of Congress of March 3, 1891, consenting to "taxation under the authority of the laws of the State of Arkansas applicable to the equal taxation of personal property in that State as personal property of all structures and other property in private ownership on the Hot Springs National Park Reservation", with the additional statement that the area is not extra-territorial; and cites the case of *Pollock* v. *Farmers Loan & Trust Co.*, 158 U. S. 601, for its authority in holding that the Arkansas income tax is a property tax within the meaning of the right extended aforesaid. We wish, therefore, to discuss the nature of the Arkansas income tax as it has been defined by the courts of this State, and as taxation is limited in Arkansas by the provisions of the Arkansas Constitution.

The Pollock case was decided by this Court on May 20, 1895, thirty-four years prior to the passage of the Arkansas Income Tax Act, and twenty-one years after the

adoption of the present Constitution of Arkansas in 1874, and this decision was a familiar signpost to every student of income tax and was uppermost in the minds of all Legislatures thereafter contemplating the passage of an income tax act, with respect to what extent they might be, limited by their own particular State constitutions.

At the time of the adoption of the Arkansas Constitution, the field of taxation was limited to only a few subjects, and the bulk of the income of the State was derived from taxes on real and personal property. We think that it is fair to state that income tax in that day did not exist in the minds of most advanced students of taxation, and for a number of years serious doubt existed in the minds of the lawyers and of the courts of the authority of the State to levy an income tax of any character under the taxing powers defined in the Constitution of Arkansas of 1874, which statement is substantiated by the reasoning of the Court in the cases which we shall discuss in this connection.

Article XVI, paragraph 5, of the Constitution of Arkansas of 1874 deals with the subjects of taxation existing in this State, and it was not amended prior to the passage of the Arkansas Income Tax Act nor subsequent to that time. It provides as follows:

> "All property subject to taxation shall be taxed according to its value (a), that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State (b). No one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value (c), provided the General Assembly shall have power from time to time to tax hawkers, peddlers (d), ferries, exhibitions and privileges (e), in such manner as may be deemed proper."

The courts of this State have uniformly held that the provisions of equality and uniformity apply only to real and personal property on an ad valorem assessment.

The Supreme Court of Arkansas, in the case of *Davies* v. *Hot Springs,* 141 Ark. 521, in which case it was claimed that a privilege tax which had been assessed discriminatorily and without equal application to all occupations was void, said (page 526):

> "It is claimed, however, that the statute provides an unjust and discriminatory method of classification which renders it void. In consideration of that question it must be remembered that the provision of the Constitution *with respect to uniformity in taxation"* (italics ours) "applies only to a property tax and has no reference to the taxation of privileges."

With this constitutional restriction in view, and realizing that an income tax was not equal and uniform on all property regardless of value, and, further, intending that it should operate on a graduated scale, the General Assembly of Arkansas for 1929 passed the Arkansas Income Tax Act. In order to safeguard the Act so that it would not be invalid by reason of constitutional prohibition, and so that it would not fall within the classification of the prohibition contained in the case of *Pollock* v. *Farmers Loan & Trust Company, supra,* the Legislature in the preamble to and the body of the Act went to great length to classify it as at least something separate and apart from a tax on property or a tax in any manner determined by the use of property, unaffected by either Sections (a) or (b), Article XVI, paragraph 5, of the Constitution of Arkansas. The preamble, Section 3, recites:

> "Whereas, agricultural and industrial development is now being retarded because of a policy to

secure practically all of the revenue from an ad valorem tax, thus penalizing and discouraging ownership of property, while many who enjoy the benefits of government and have large incomes, pay almost nothing to support the Government;

"Article II—*Imposition of Tax.*

"Section (3) (a)—On Individuals.—A tax is hereby imposed upon and with respect to the entire income of every resident, individual, trust, or estate, which tax shall be levied, collected and paid annually upon such entire net income as herein computed, at the following rates, after deducting the exemptions provided in this Act; * * *

"(b) On Corporations.—Every corporation organized under the laws of this State shall pay annually an income tax *with respect to carrying on or doing business*" (italics ours) "equivalent to two (2%) per cent of the entire net income of such corporations as defined herein, received by such corporation during the income year; * * *

"(c) On Income of Arkansas property of non-residents.—A like tax is hereby imposed * * * with respect to the entire net income * * * *from all property owned*" (italics ours) "and from every business, trade or occupation carried on in this State by individuals, corporations, partnership, trusts, or estates, not residents of the State of Arkansas."

At least, so far as the tax on corporations was concerned, the Act itself tried to limit and confine it to that of use or privilege, so that it could not by any possibility offend the provisions of equality and uniformity required by the first two sections of Article XVI, paragraph 5, of the Constitution of Arkansas, and this in addition to generally limiting the classification of income tax to something

separate and apart from property tax, whether equal and uniform or not, as reflected by the preamble.

The general Act was attacked in the courts of the State of Arkansas on many grounds, of which the two most prominent were, first, that Arkansas was precluded by the Constitution from enacting an income tax of any character, and, second, that if a property tax, it was invalid on account of the provisions of the Constitution which we have quoted above. The Supreme Court sustained the right of the State to levy an income tax, but on the question of whether or not it constituted a property tax in any sense of the word, held, in the case of *Stanley* v. *Gates,* 179 Ark. 886, that the income tax imposed by the Act of 1929 was not a property tax and that it did not fall within the classification of the first two provisions of Article XVI, paragraph 5, of the Constitution of Arkansas; that these two provisions related to the property itself, as distinguished from the annual gain or revenue from it, and that it was not such a tax as was subject to the uniformity provision of the first two sections of this article of the Constitution. The Court said that it deliberately adopted the view that it was not a property tax and that if not a property tax it made no difference by what name it was called, whether excise, in the nature of an excise, personal, or otherwise.

We therefore feel that in the face of this decision it would be impossible to so construe Act No. 30 of Arkansas of 1903 as having any reference to income tax, particularly since the State of Arkansas had no form of income tax at the time this compact was entered into between the State of Arkansas and the United States. How, therefore, could the contracting parties have had in mind such a species of taxation, for until this decision it was, as stated, extremely

doubtful that the Legislature had the constitutional power to levy any income tax.

In the Stanley case the Court said, at page 891:

"Reference to the various opinions in that case will show that the court recognized that there was a division in the authorities upon the subject, whether an income tax was a property tax or not, and we deliberately adopted the view that it was not a property tax. If it is not a property tax, it does not make any difference what name it is called, whether it is called an excise tax, or a tax in the nature of an excise tax, or a personal tax, is a matter of definition, and does not in any wise change its character."

And at page 893:

"There is no good reason for holding that inheritance tax laws and severance tax laws are not property taxes within the meaning of Article XVI, paragraph 5, of our constitution, and that income taxes are property taxes and fall within the ban of its provisions. A majority of the court has yet to see the distinction * * * It has been well said that 'a tax on incomes is not a tax on property, and a tax on property does not embrace incomes.' Hence a majority of the court holds that 'property' as the term is used in Article XVI, paragraph 5 of the Constitution means the property itself as distinguished from the annual gain or revenue from it."

And at page 900:

"Having held that an income tax is not a property tax, it follows that the equality and uniformity clause of the Constitution applicable to taxes on property has no reference to income taxes, and income taxation of a progressive character does not offend paragraph 18 of our bill of rights nor the Fourteenth Amendment to the Constitution of the United States guaranteeing equal protection of the laws."

Again the Supreme Court of Arkansas, in the case of *Baker* v. *Hill*, 180 Ark. 387, in which the Income Tax Act of Arkansas was under consideration, with respect to whether or not the rate imposed, in addition to other taxes levied on property for State purposes, exceeded the constitutional limitation of 1%, said, at page 391:

"* * * If the Legislature has power to raise revenue for State purposes by a property tax, it may also levy a tax for that purpose upon any other legitimate subject of taxation. There is a marked distinction in our Constitution as recognized in our adjudicated cases, between property and other subjects of taxation. The phrase, 'subjects of taxation', embraces all property as such, and all other items on which a tax rate may be laid as a source of revenue for the support of the State Government. Since the Constitution contains no restriction on the power of the Legislature to levy taxes except as to property as such, the Legislature has full and complete power in the levy of taxes for State purposes as to other recognized subjects of taxation. The section under consideration is a part of article 16 of the Constitution on the subject of "Finance and Taxation.' Section 5 of the same article is commonly called the equality and uniformity clause of the Constitution, and has been uniformly construed by this court as relating to property only."

And at page 392:

"In *Sims* v. *Ahrens*, 167 Ark. 557, 271 S. W. 720, it was held that, while the act under consideration subjecting all persons and corporations to a gross income tax was void because it necessarily operated in a discriminatory and arbitrary manner, still it was within the power of the Legislature to pass a properly classified net income tax law. This rule was reaffirmed in *Stanley* v. *Gates*, 179 Ark. 886, 19 (2d) S. W. 1000. In that case the court again held that an income tax was

not a property tax, and that the act therefore was not violative of the equality and uniformity clause of Section 5, art. 16, of the Constitution, which relates exclusively to property taxes."

"It necessarily results from these decisions that there are other sources of revenue for State purposes than that derived from the taxation of property. If the equality and uniformity clause of Sec. 5, art. 16, refers exclusively to property taxes and not to other subjects of taxation for State purposes, such as inheritance taxes, severance taxes, *income taxes* (italics ours) and privilege taxes, we can perceive no good reason why the limitation of the rate of taxation referred to in Sec. 8, art. 16, should not also be confined exclusively to property taxes. * * *"

And at page 394, where the Supreme Court of Arkansas declined to adopt the contrary holding of the Supreme Court of Alabama, the Court further said:

"* * * We have taken the contrary view, as will appear from our cases cited above, and have expressly held that an income tax and a property tax are not one and the same thing. * * *"

Regardless of the character of the tax involved in the case of *Pollock* v. *Farmers Loan & Trust Co.*, 158 U. S. 601, the fact remains that the Arkansas Income Tax Act by its terms and by the unmodified decision of the highest court of that State, is not a property tax of any kind or character. It cannot be fish for the purpose of escaping a State constitutional prohibition rendering it invalid and fowl for the purpose of bringing it within the terms of the taxing grant represented by the compact entered into between the State of Arkansas and the United States.

In the opinion from which this appeal has been taken, the Court says, at the bottom of page 798 (Record 19):

> "It would be an anomalous situation indeed if we should say that an excise tax levied for unemployment against those coming within the law's classifications includes operations within the Reservation, when authority for its enaction came from a State statute as distinguished from congressional authority, but that a tax on incomes *levied uniformly*" (italics ours) "against all citizens, could not extend to the Reservation because the term 'personal property' was used in the Act of 1891."

We think that we have shown above that the right in the first instance, by the decision of this Court, was due to an implied extension in a subsequent Act of Congress, that is, the national Social Security Act, and but for that Act the right did not exist. Congress since that time has expressly extended the right to tax for social security within the area, but it has not surrendered any of its other taxing sovereignty.

Particularly do we wish to call this Court's attention to our contention that the word "equal", that is, uniform, as used in the acts constituting the compact, refers to classification of property and not persons. A privilege tax or occupation tax or license imposed by the State respecting operations on the Hot Springs Reservation would not be effective if the State lacked the sovereignty to exact it, regardless of the fact that it might apply uniformly and equally to all of a class in the State.

The Supreme Court of Arkansas, in the present opinion, reaffirms the classification of the Arkansas income tax as an excise. We quote from page 798 of that opinion (Record 19):

> "* * * Although classified as an excise, our income tax is treated by the courts as having many of the characteristics of a property tax. * * *"

For the sake of argument only let us go further and say that in addition to "*having many of the characteristics of a property tax*" it in fact was some species of a property tax—even that would not bring it within the definition of the tax-reserving clause, for in addition to being a species of a property tax it still would not be a property tax, measured by the qualifying word in the reservation, that is, "personal" property; it still would not be, measured by the qualifying phrase "equal" taxation.

The Arkansas income tax, if considered in the light of "having some of the characteristics of a property tax". nevertheless fails to remotely resemble the kind of tax described in the acts of cession and acceptance. It is not limited to income derived from personal property, nor is there any attempt made to measure it by the use of personal property. It would be impossible to separate that portion of the tax which bore any relationship to the use of personal property, from the portion resulting from earnings occasioned by good management, advertising, personal services, fortunate location, and many other things which go to producing net income.

The Supreme Court of Arkansas summarily disposes of the question by holding that there is authority under the "General Act of 1891 for the State to extend to lessees of personal property on the Reservation the tax assessed against all other citizens within the State" (paragraph 4, page 798, this opinion; Record 19, Par. 1). It ignores completely the words of the Act of 1891, "applicable to the equal taxation of personal property", and substitutes the test of applicability to "all other citizens within the State." This presupposes that the State had the sovereign power to legislate over the area. If the State had sovereignty, that is, if the Act of 1891 extended general

taxation rights as in the case of California over the Yosemite Park area, the Constitution of Arkansas and the United States always would have required the tax levied, as affecting the area, to apply in the same manner "as against all other citizens within the State", but we insist that no such taxing authority was authorized by the compact. The fact of uniformity as to citizens therefore apparently fails to shed little or no light on the meaning of the words of the compact, and the meaning of those words is the subject under consideration.

But regardless of all of this, the Court in the first sentence of this paragraph necessarily placed income tax in the category of a tax "applicable to the equal taxation of personal property" directly contrary to paragraph two on the same page of the opinion, wherein the Court discussed the case of *Stanley* v. *Gates,* and reaffirmed or at least did not change its former opinion holding that the tax in question was an excise and bore no relationship to property or the annual gain or revenue from property. The second sentence of this fourth paragraph changes the property tax back to an excise with some of the characteristics of a property tax, and in the last sentence, there being three in the paragraph, the lack of uniformity and the rate excess is cured by the fact that the tax in question—the income tax—is not the kind of tax required by the laws of Arkansas to be uniform. The tax in our opinion ought to maintain its distinguishing and fundamental characteristics at least throughout one paragraph.

The Constitution of Arkansas, Article 16, Section 8, provides:

> "The General Assembly shall not have power to levy State taxes for any one year to exceed in the

aggregate 1% of the assessed valuation of the property of the State for that year."

The income tax is 2%. The Court has repeatedly held that Section 8, *supra*, applies only to property, that is, the property classified under paragraph 5, sections (a) and (b), of Article 16, of the Constitution of Arkansas. Income tax is not in this classification. The Court in this last sentence says the Arkansas income tax is not invalid for offending this Section 8 because in effect it is not a tax subject to requirements of "equal taxation of personal property." It is now by this sentence something different from what it was in order to come within the terms of the compact in the first sentence. We elect to stand on the statement of the Supreme Court of Arkansas in *Stanley* v. *Gates*, 179 Ark., at page 891, and that is:

> "If it is not a property tax, it does not make any difference what name it is called, whether an excise tax, or a tax in the nature of an excise tax, or a personal tax, is a matter of definition, and does not in any wise change its character."

Property, as that word is understood in its generic sense, may be divided for the purpose of taxation into its component parts, as stated by this Court in the case of *Henneford* v. *Silas Mason Company*, 300 U. S. 577, and *Nashville, Chattanooga & St. L. Ry.* v. *Wallace*, 288 U. S. 249; and if property can be so divided, likewise under the decisions of this Court *supra*, a division of taxing power may be entered into between the State and the United States, each exercising sovereignty over the part retained by it. Arkansas did not take for its share property generally, but property qualified. It took the fagots mentioned by this court in the Henneford case, which were labeled with equal or uniform personal property tags. All the remaining

component parts become the property of the United States for taxation as well as regulation, to the extent which it saw fit to exercise. The opinion of the Supreme Court holding to the contrary appears to be repugnant to the Acts of Congress and the decisions of the courts of the United States on the subject.

We therefore believe from the foregoing that we have established our contention that income tax of Arkansas is not a property tax within the plain meaning of the reservation of the taxing privileges obtained by the State from the terms of the compact represented by the reciprocal Acts of Congress of March 3, 1891, and April 20, 1904, and Act No. 30 of Arkansas of 1903.

III.

The State is precluded from collecting an income tax on the privilege of conducting business in a place beyond its sovereignty.

In the event that we have established our contention that Arkansas has surrendered sovereignty over the area, and lacks the power to impose the particular tax under the terms of any agreement entered into with the United States, then under the authority of *James* v. *Dravo Contracting Company, supra,* it follows that it lacks the power to levy such tax on an Arkansas corporation for the privilege of conducting business within the Hot Springs Reservation.

There was an attempt by the Legislature to impose the tax in a different manner, first, on individuals, second, on corporations, and, third on non-residents; and in the case of corporations—that is, appellant—the levy is "with respect to carrying on or doing business." Evidently this was intended to operate as a privilege or excise tax, and it was within the power of the Legislature to make such a

distinction between corporations and individuals, there being no other prohibition, and if the meaning of the words quoted is to that effect, the levying of the tax clearly is prohibited by this Court's decision in that case.

IV.

Compacts entered into between States and the United States on the surrender of sovereignty over lands lying within the boundaries of the State are to be construed in the same manner as ordinary contracts between individuals, with a strict construction against neither.

We believe that the case of *James* v. *Dravo Contracting Co.,* 302 U. S. 134, is authority in general for this statement and that the case of *Collins* v. *Yosemite Park & Currie Co.*, 304 U. S. 517, specifically on the question of construction supports our contention, for in the latter case this Court says, at page 532:

> "As the respective acts of State and nation were in the nature of mutual declaration of rights, this is not an occasion for strict construction of a grant by a State limiting its taxing power."

And at page 528:

> "Whatever the existing status of jurisdiction at the time of their enactment, the acts of cession and acceptance of 1919 and 1920 are to be taken as declarations of the agreements reached by the respective sovereignties, State and nation, as to the future jurisdiction and the rights of each in the entire area of Yosemite National Park. * * * The States of the Union and the National Government may make mutually satisfactory arrangements as to jurisdiction of territory within their borders and thus in a most effective way, co-operatively adjust problems flowing from our dual system of government. Jurisdiction obtained by consent or cession may be qualified by agreement or through offer and acceptance or ratification. It is a

matter of arrangement. These arrangements the courts will recognize and respect."

If the meaning of the words in the clause of the act reserving the right to tax cannot be determined from its context, or from its connection with other acts on the subject, or from the courts' decisions rendered prior to the passage of the Act, there is still one more source to examine to ascertain the meaning of the clause, and that is the subsequent acts of the parties with reference to the compact entered into. No denial can be made of the fact that the United States has since the acts of cession and acceptance exercised complete sovereignty over the area. The State of Arkansas on its part since that time has confined the exercise of its rights in the area to the taxation on an ad valorem basis of the physical properties of individuals thereon, and in the particular matter the Commissioner of Revenues of the State of Arkansas in 1929 adopted the construction of the clause contended for by the appellant. The State, which can act only through its officers, had acquiesced in that construction for ten years when this demand for the payment of income tax was made. We urge this not as a claim of estoppel against the State, but as an aid to construction of the Act.

We do not think that it is necessary, however, to go beyond the plain wording of the Act to determine its meaning, especially in view of the decision of the Supreme Court of Arkansas in the Gaines case and the subsequent passage of the Act, and we think that the Supreme Court of Arkansas is definitely committed by its statement in the case of *Merchants Transfer & Whse. Co.* v. *Gates*, 180 Ark., at page 102:

"It is a fundamental rule of construction that the Legislature is presumed to have enacted a statute in

the light of all judicial decisions relating to the same subject."

V.

The exemption extended corporations from the payment of income tax on operations conducted beyond the sovereignty of Arkansas and the imposition of a tax in a like situation on appellant's income constitutes a denial to it of the equal protection afforded it under Amendment XIV to the Constitution of the United States, and the sale of its property for such tax would constitute the taking of its property without due process of law, in violation of Amendment V to the Constitution of the United States.

The Supreme Court of Arkansas either ignored this contention made by appellant in that Court or impliedly admitted that if income tax was not embraced in the meaning of the clause reserving taxing power, the principle of law announced applied in this case. In disposing of the question, that Court said, at page 799:

> "We do not agree with appellant that the Reservation, for purposes of taxation, is not within the State."

However, if this Court is convinced from the foregoing argument that Arkansas does not have sovereignty over the area in question and that Act No. 30 of the Legislature of 1903, does not reserve income taxation, then the decision of the Supreme Court of Arkansas in the case of *McCarroll, Commissioner, Et., v. Gregory-Robinson-Speas, Inc.,* 198 Ark. 235, is controlling, and we do not believe that any serious contention will be made to the contrary by appellee. That case was based on the decision of this Court in the case of *Royster Guano Co. v. Virginia,* 253 U. S. 412, in which it was held that the portion of the income of a domestic corporation derived from operations conducted beyond the sovereignty of Arkansas

was exempt from income tax, in the construction of Act No. 220 of the Acts of Arkansas for 1931, in relation to Act No. 118 of Arkansas for 1929 (the income tax Acts).

The Legislature is not permitted to exempt corporations doing business entirely without the State from the payment of income tax and yet impose an income tax on that portion of the business done outside the State by one operating both within and without the State of Arkansas, on account of the prohibition contained in Amendment XIV to the Constitution of the United States, the reason being, as given in the opinion, that such a classification would be arbitrary and discriminatory and that the classification could not be based on any substantial ground that did not apply equally to both.

The Legislature of 1931 was attempting to secure the incorporation of foreign interests under the laws of this State, in competition with other States which had particularly liberal laws for domestication of such companies, and as an inducement offered them exemption from the payment of income tax, for the simple reason that the laws of Arkansas, so far as actual operations and business were concerned, had no application to or effect over their conduct in other sovereign areas. Neither would the corporation and its operations beyond the sovereignty of the State have the benefit of the protection of the laws of the State of Arkansas. Any business which any other corporation of any classification does beyond the sovereignty of the State likewise is not subject to the regulation and control of the laws of the State of Arkansas, nor does that business so done have the benefit of the protection of the laws of the State of Arkansas, and to tax one and exempt the other we contend amounts to a discrimination and unequal classification, in violation of the Constitution.

The test of the reasonableness of the classification is not in the wording of it, but the reasoning behind that wording, and the use of the term "doing business wholly outside the State" does not of itself make a substantial classification. This Court said, in the Royster case, at page 415:

> "But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

And:

> "The imposition upon them * * * of taxes, not only upon this income but also upon income that they derived from business conducted outside the State (similar income of the favored corporations being exempted) has the effect of discriminating against them for that *which ought to operate, if at all, in their favor.*" (Italics ours.)

Act No. 220 of Arkansas for 1931 made no attempt to limit its operation to income derived from operations in another sovereignty where the operation was there subject to income, franchise or other tax. The income of a corporation deriving all of its income from Texas operations, which State has no income tax act, is exempt from taxation under the act, and under this decision. The income of an Arkansas corporation derived from operations partly here and partly in Texas is likewise exempt under this decision from taxation on the Texas income. Therefore, following the reasoning and the language of the Royster case, what logical and substantial ground could be suggested or conceived for this exemption of those two classes which "does not apply with equal or greater force as a

ground for exemption from taxation of the income" of appellant from its National Park operations?

All three operations are without the benefit of the laws of Arkansas and beyond the reach of those laws. They are all subject to national income tax. At the present time, none are subject to income tax at the place of earning the income. There is nothing, however, to prevent the sovereign from taxing that income at the place where it is earned at any time it sees fit. The only difference is that appellant pays to Arkansas a personal property tax on all of its property, including its buildings, and neither of the other pays one cent to Arkansas on its physical properties located in Texas, "which ought to operate, if at all", in favor of appellant and not against it.

The most that can be said is that appellant might derive some indirect benefit from Arkansas by reason of the proximity of the Park to the City of Hot Springs, but the same thing would apply to any other border city. The test of the right to tax is sovereignty. We believe that it is a debatable question as to whether the City of Hot Springs, and therefore Arkansas, gets more benefit from the location of the National Park on account of its proximity than the National Park gets from Arkansas, with the argument in favor of the Park.

No one questions the authority of Arkansas to levy an income tax on corporations organized under its laws by reason of operations at any place so long as the same is equal and uniform and applies with like effect to all of the class, and if an unhealthy situation has been created, a repeal of Act No. 220 of Arkansas for 1931 would correct it. However, that is a matter for legislative determination and so long as that Act remains in effect income derived

from business transacted not outside the State of Arkansas, as determined by boundary lines, but outside the sovereignty of the State, where its laws have no force, is not subject to income tax, and its imposition violates the Constitution.

Arkansas probably would be reluctant to abandon the benefits it derives from the enactment of Act No. 220 in 1931, in order to reach revenue from appellant's operations and from the sources precluded by the decision in the case of *McCarroll, Commissioner,* v. *Gregory-Robinson-Speas, Inc., supra,* but that is another question for the General Assembly to decide. It cannot have both, and if by repeal or modification it takes the latter, the parties affected can then adjust themselves to meet the situation. The same result accomplished by judicial determination operates *ex post factor.*

CONCLUSION

We think that the authorities cited sustain us in our contention that this Park area has ceased to be a part of Arkansas and has passed over to the United States just as effectively as if it had been exempted on admission; that regardless of the fact that it is completely surrounded by the State, the character of the sovereignty over it is no different from the indentation of Missouri in the northeast corner and Texas in the southwest.

We have not been able to find one Arkansas case that does not hold that equal and uniform taxation and the 1% rate limit applies only to that species of property assessed on an ad valorem basis. Certainly the cases bear us out in the argument that income tax is not in this classification, and if not, likewise it is not a tax within the meaning of the words embraced in the compact, and those words of

necessity must be given some meaning, since they are not presumed to have been used purposely.

In fact, the income tax in the particular case is not levied equally and uniformly on appellant as on Arkansas businesses in its ultimate effect, for the Arkansas merchant or operator can pass his tax on to the consumers at the time of fixing the price for merchandise or service. Appellant operates only under the rules and regulations of the United States, the Department of the Interior and its division on Natural Parks; its business is subject to the control of the Park Commissioner; the price which it charges for its services is fixed by the regulations pertaining to the Park; it is limited as to the time and amount of dividends which it may pay, by the regulations under which it operates, and it is regulated in many other respects not applicable to the business of the Arkansas merchant or operator. It is, in short, amenable to another sovereign, and no Act of Arkansas whatever can have any effect on forcing the United States to adjust these regulations under which appellant operates and the price of its services to meet the tax.

The compact may have failed to operate to the satisfaction of one or both of the parties, and if so it is a subject that could be adjusted by Congress and the Legislature of Arkansas, as was said in the Lowe case:

> "* * * and if to their more effective use a cession of Legislative authority and political jurisdiction by the State would be desirable, we do not perceive any objection to its grant by the legislature of the State."

This applies equally to both parties, and if Arkansas in fact needs more sovereignty over this area, it is, likewise, in the power of Congress, on proper showing, to grant it, but until that is done the compact remains a matter

of arrangement between the parties. "These arrangements the Courts will recognize and respect." (*Collins* v. *Yosemite Park & Currie Co., supra.*)

We earnestly contend that the State of Arkansas failed to save enough taxing power on the surrender of sovereignty in this area to permit the exaction of income tax which the Supreme Court of Arkansas in its last announcement, that is, this very decision, classifies as an excise tax, and that it was not in fact the intention of Congress or the Legislature of Arkansas to contract or enter a compact with reference to a tax of this classification, especially since no such existed at that time.

We urge that if this area is beyond Arkansas' sovereignty, the imposition of a tax on appellant or its operations and the exemption of others under similar circumstances denies to appellant the equal protection afforded it under the Constitution, and the sale of its property for the tax would be without due process of law.

We respectfully contend that the decision in the present case should be reversed.

Terrell Marshall,
E. R. Parham,
Counsel for Appellant.

Terrell Marshall

APPENDIX

Act No. 30 of the General Assembly of the State of Arkansas, approved February 21, 1903:

"SECTION 1. That exclusive jurisdiction over that part of the Hot Springs Reservation known and described as part of the Hot Springs mountain and whose limits are particularly described by the following boundary lines * * * all in Township 2 South, Range 19 West, in the County of Garland, State of Arkansas, being part of the permanent United States Hot Springs Reservation, is hereby ceded and granted to the United States of America, to be exercised so long as the same shall remain the property of the United States; provided, that this grant of jurisdiction shall not prevent the execution of any process of the State, civil or criminal, on any person who may be on such reservation or premises; provided, further, that the right to tax all structures and other property in private ownership on the Hot Springs Reservation accorded the State by the Act of Congress approved March 3, 1901" (1891) "is hereby reserved to the State of Arkansas."

Constitution of Arkansas (1874), Art. XVI:

"SEC. 5. All property subject to taxation shall be taxed according to its value (a), that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State (b). No one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value (c), provided the General Assembly shall have power from time to time to tax hawkers, peddlers (d), ferries, exhibitions and privileges (e), in such manner as may be deemed proper."

"SEC. 8. The General Assembly shall not have power to levy State taxes for any one year to exceed

in the aggregate one per cent of the assessed valuation of the property of the State for that year."

Act of Congress, April 20, 1832, 4 Stat. at L. 505, par. 3:

"The hot springs in said territory, together with four sections of land, including said springs, as near the center thereof as may be, shall be reserved to the future disposal of the United States and shall not be entered, located or appropriated for any purpose whatever."

Act of Congress, December 16, 1878, c. 5, 20 Stat. 258:

"Provided, that all titles given or to be given by the United States shall explicitly exclude the right to the purchaser of the land, his heirs or assigns, from forever boring thereon for hot water; and the hot springs, with the reservation and mountain, are hereby dedicated to the United States and shall remain forever free from sale or alienation."

Act of Congress, March 3, 1891, c. 533, par. 5, 26 Stat. 844:

"The consent of the United States is hereby given for the taxation under the authority of the laws of the State of Arkansas applicable to the equal taxation of personal property in that State, as personal property, of all structures and other property in private ownership on the Hot Springs Reservation."

Act of Congress, April 20, 1904, c. 1400, par. 1, 33 Stat. 187:

"The portion of the Hot Springs mountain reservation in the State of Arkansas situated and lying within boundaries defined as follows * * * all in Township 2 South, Range 19 West, in the County of Garland and State of Arkansas, being a part of the permanent United States Hot Springs Reservation, sole and exclusive jurisdiction over which was ceded to the United States by an act of the General Assembly of the State

of Arkansas * * *, which cession is hereby accepted * * * shall be under the sole and exclusive jurisdiction of the United States * * *. Provided that nothing in this act shall be so construed as to forbid the service within said boundary of any civil or criminal process of any court having jurisdiction in the State of Arkansas * * * And provided, further, that this act shall not be so construed as to interfere with the right to tax all structures and other property in private ownership within the boundaries above described accorded to the State of Arkansas by section 5 of the Act of Congress approved March 3, 1891, entitled 'An Act to Regulate the Granting of Leases at Hot Springs, Arkansas, and for Other Purposes'."

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Supreme Court of the United States

OCTOBER TERM, 1940

No. 180

SUPERIOR BATH HOUSE COMPANY, ... *Appellant*,

v.

Z. M. McCARROLL, COMMISSIONER OF REVENUES FOR THE STATE OF ARKANSAS, ... *Appellee*.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

REPLY BRIEF FOR APPELLANT

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Counsel for Appellant.

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We believe that the determination of the question involved in this appeal is dependent upon the construction of the terms of the compact entered into by the United States and the State of Arkansas as reflected by the Act of Congress of March 3, 1891, the General Assembly of the State of Arkansas of February 21, 1903, and the Act of Congress of April 20, 1904, to which specific reference has been made in the brief filed by appellant, in which statement appellee apparently concurs, as reflected by paragraph three, page 7, of his brief. For this reason, we are submitting this brief in reply to correct what we think is an apparent, though innocent and unintentional misstatement of the terms of the Act of Congress of April 20, 1904, in their relationship to those of the Act of Congress of March

3, 1891, as reflected by the first and second paragraphs of page 16 of his brief, wherein the statement is made that "* * * 'Congress did not mention any restriction on the taxing right of the State of Arkansas in this statutory enactment; it described the right of taxation of the State as including the right to tax all structures and other property in private ownership within the boundaries of the Hot Springs Reservation, without any limitation to a particular form of such taxation."

As authority for this statement a citation is made to Title 16, Section 372, United States Code Annotated. This section of that Code is a digest of the act of acceptance of the ceded area, namely, the Act of Congress of April 20, 1904, c. 1400, paragraph 1, 33 Stat. 187. It in turn in describing the taxing rights which the State of Arkansas has in the area, refers to and embraces Section 365, Title 16, of that Code. This Section 365 is a digest of the original taxing grant of the Act of Congress of March 3, 1891, which the Legislature of the State of Arkansas, in Act No. 30 of the General Assembly approved February 21, 1903, adopted and embraced. This Act of March 3, 1891, therefore, is a part of each of the other two Acts, and it provides:

> "The consent of the United States is hereby given for the taxation under authority of the laws of the State of Arkansas applicable to the equal taxation of personal property in that State, as personal property, of all structures and other property in private ownership on the Hot Springs Reservation."

It is true that neither of the acts used the words "ad valorem" as an additional description of the character of the taxing right accorded the State of Arkansas, as stressed by appellee in his argument on the subject of the construc-

tion of these acts, at pages 14 and 15 of his brief. But they do by reference to the Act of March 3, 1891, use the term "equal taxation of personal property."

Article XVI, Section 5, of the Constitution of Arkansas, section (a), uses the term "equal and uniform" and not "ad valorem", and the courts of this State have uniformly held that said sections (a) and (b) of the Constitution referred to, apply to that property assessed on an ad valorem basis. "Ad valorem" is not a descriptive term of a species of tax. It simply means according to value, as distinguished from use.

Section III of the brief of appellee, is devoted to an argument that geographical boundaries of the State determine the applicability of the cases of *Royster-Guano Company* v. *Virginia,* 253 U. S. 412, and *McCarroll, Commissioner,* v. *Gregory-Robinson-Speas, Inc.,* 198 Ark. 235, 129 S. W. (2d) 254, in their consideration of Amendment XIV to the Constitution of the United States. Apparently the contention is made that the decision of this Court in the case of *Collins* v. *Yosemite Park & Currie Co.,* 304 U. S. 517, has the effect of limiting the Royster case, *supra.*

If the Court will again refer to our original brief, pages 43 to 47, inclusive, it will be noted that it was our contention that the State is precluded from collecting an income tax on business conducted in a place outside of its sovereignty. We did not there contend, nor do we now contend, that the Hot Springs National Park is beyond the geographical limits of the State of Arkansas, or that appellant was organized under Act No. 220 of the Acts of Arkansas for 1931. In this connection, we do not think therefore that this Court is concerned primarily with the question of the construction of the meaning of the words "doing business entirely outside the State of Arkansas", which refers

to the corporations organized under the laws of this State and which by the Act are exempt from the payment of all taxes except that upon tangible property within the State. That question would be involved only in the event appellant contended that it was entitled to the benefit of the Act itself. Act No. 220 of Arkansas for 1931, has extended to certain corporations a privilege or an immunity which has not been extended to all other corporations organized under the laws of Arkansas, whether to do business within the park area, military reservations, partly in the State and partly out the State, and otherwise. The Act itself therefore raises the question of the application of Amendment XIV to the Constitution of the United States. In other words, is appellant by the constitutional provision entitled to the same privilege or immunity, and is an Arkansas corporation not organized under Act No. 220 which conducts business within and without the State, likewise entitled to this privilege or immunity? The constitutional provision requires that it be extended if a similar circumstance exists, and the Supreme Court of Arkansas in the McCarroll case, *supra*, says that a similar circumstance does exist with reference to that portion of the income derived from the Texas operations of Gregory-Robinson-Speas, Inc., not because the words "outside the State" were used in Act No. 220, but because of the classification resulting therefrom, and, in the final analysis, because the operations beyond the sovereignty of the State in each instance were without the benefit of and not subject to regulation by the State of Arkansas. The test, we therefore contend, is sovereignty.

As we have pointed out in our original brief, appellant's operations are conducted solely under the rules and regulations pertaining to national parks and under a system of laws of another sovereign, that is, the United States.

Arkansas contributes nothing to its operations; it does take something from those operations, that is, the tax permitted by the Act of Congress of March 3, 1891, but nothing else, which ought under the Royster case to operate in its favor and not against it.

We do not believe that the decision in the case of *Collins* v. *Yosemite Park & Currie Co., supra,* has modified, nor did it intend to modify, the Royster case, as contended by appellee, or that the Supreme Court of Arkansas intended to limit its decision in the McCarroll case strictly to a situation where a domestic corporation derives income from within the State of Arkansas and from other States. In the Collins case Amendment XIV to the Constitution of the United States was not involved, and in the McCarroll case sovereignty in other areas not beyond the geographical boundaries could not be involved. It was unnecessary for the Supreme Court of Arkansas, in reaching a decision in that case, to make any distinction between the terms "outside the State" and beyond the sovereignty.

The Court was powerless to limit the application of the constitutional guarantee of equality and uniformity, and there is no indication that such an attempt was even contemplated in that decision, but quite to the contrary the opinion stressed the need for absolute equality and uniformity; thereby nullifying the act of the Legislature which had infringed the constitutional provision.

It is arguing in a circle to say that because the act levying the tax states that it shall apply to all persons within the geographical borders of the State, it necessarily follows as a matter of law that it could not infringe this constitutional provision, for the advocate of this finds himself right back to a construction of the terms of the Act of Con-

gress of March 3, 1891, to determine the sovereign authority to levy the tax in the first instance.

A legislative enactment infringes the Constitution from the date of its enactment if at all, and whether or not it infringes is determined by reference to the act itself, and not by what some person may have done or may do under it. It is the holding out of opportunity to create a situation of unequality, and not the taking advantage of the opportunity, that renders the act unconstitutional. For instance, let us test appellee's theory by the Gregory-Robinson-Speas case itself. The Court held that its Texas operations for the year in question were not subject to income tax, because Act No. 220 of 1931 had made it possible for a corporation to organize here, do all its business in Texas, and be expressly exempt from income taxation. If for some reason that company should fail to do one dollar's worth of business in Arkansas during the following year, either through choice or destruction by fire of its Arkansas plant, and at the same time file no amendment to its articles of incorporation, it would be apparent that a tax levied on the Texas operations for the latter year would not change from unconstitutionality to constitutionality. If this were not so, what would be the test of the amount of business the company would have to do in Arkansas to maintain its status on Texas operations?

In the Collins case, in addition to the per unit sales tax, an additional license feature was embraced in the act, and each provision purported to extend to the geographical limits of the State of California. The license tax was upheld by this Court because California had reserved "the right to tax persons and corporations, their franchises and property." The license feature was not upheld, and it was enacted to apply "in this State" just the same as the unit

sales tax. So, again, the answer is found in the extent of the sovereignty reserved by the State in its act of cession.

The property tax involved in the case of *Surplus Trading Co.* v. *Cook,* 281 U. S. 647, by the terms of the act levying the tax, extended to the geographical limits of Arkansas; nevertheless, it was inoperative on the United States military reservation, because sovereignty did not exist in the State to levy it within the area, which likewise is in the geographical borders of Arkansas. All of this of course shows that the act levying the tax in the first instance cannot override the Constitution or exceed the State's sovereignty merely by a statement contained in it that it applies to a given geographical area.

In Section IV of appellee's brief, apparently the position is taken that the State has general taxing power over individuals in the area and that any restruction applies only to such taxes as are regulatory in their nature. That would be so if Arkansas on cession of the area had reserved the right to tax persons and corporations, their franchises and property, as was done by California when it ceded the park areas in that State, but the theory is not correct unless the provisions of the Act of March 3, 1891, mean general taxation. The construction of that Act however is the primary question in this case, and if there were no question about the meaning of the terms of that act, there would be no reason for either party to be before the courts. The cases of *Williams* v. *Arlington Hotel Co.,* 22 F. (2d) 669, and *Arlington Hotel Co.* v. *Fant,* 278 U. S. 439, are offered as authority by appellee in support of his position. We quote from the first paragraph of appellee's argument on that subject:

> "In both of these cases the State acts in question were regulatory acts by which the State was attempt-

ing to exercise its police powers. Such regulations affected the Government's rights to use its own lands, and, of course, could have seriously hampered the Government in the exercise of its power to lease lands in the reservation."

Appellee apparently is not serious in that contention, for the act in question bore no resemblance to police power, but rather it was a general law of civil liability between individuals, in which the United States had no interest whatever, and which could not have affected the Government's rights in the lands in the remotest degree.

We urge that it is manifestly unfair to subject appellant and others similarly situated to an accumulation of taxes for a long period of time, in view of the acquiescence of appellee and his predecessors in office in the construction of the acts in question advocated by appellant, since during this period of acquiescence the rates, dividends, reserves and operation of appellant's business have been under the supervision of the National Parks Service of the Department of the Interior without any account having been taken of contingent liability for the tax accumulation by the Department in fixing those rates, dividends, or reserves. The action of the appellee as Commissioner might have the effect of indirectly attempting to influence the rates for baths, which rates are in the exclusive jurisdiction of the National Parks Service, thereby bringing about the very situation that the parties to the compact attempted to avoid by the enactment of the statues in question on the subject.

Respectfully submitted,

Terrell Marshall,
E. R. Parham,
Counsel for Appellant.

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Supreme Court of the United States

OCTOBER TERM, 1940

No. 180

SUPERIOR BATH HOUSE COMPANY------Appellant

vs.

Z. M. McCARROLL, Commissioner of Revenues for the State of Arkansas------------------Appellee

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF FOR APPELLEE

FRANK PACE, JR.,
LESTER M. PONDER,
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Counsel for Appellee.

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SUBJECT INDEX

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BRIEF FOR APPELLEE

OPINION OF THE SUPREME COURT OF ARKANSAS

The opinion of the Supreme Court of Arkansas is correctly referred to in appellant's brief. It was rendered on April 1, 1940.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The grounds on which the jurisdiction of this Court is invoked are set out in appellant's brief in a manner which is satisfactory to appellee.

STATEMENT OF THE CASE

Appellant corporation is a corporation organized and existing by virtue of the laws of the State of Arkansas and having its only place of business within the confines of the Hot Springs National Park Reservation, which is located within the geographical boundaries of the State of Arkansas.

Appellant is engaged exclusively in the business of operating a bath house under the rules and regulations prescribed for such operation on national park areas by the United States Department of the Interior.

Act No. 118 of the Acts of the General Assembly of Arkansas of 1929 levied an income tax of 2% upon the net income of all corporations doing business within the State. Appellant filed its income tax return for the year 1928 as required by Act 118 of 1929, stating on its return that it was not subject to the provisions of the Arkansas Income Tax Law by virtue of the fact that it was located on a federal reservation (R. 4).

The then Commissioner of Revenues of the State of Arkansas agreed with appellant that it was not subject to this tax and no further returns were filed by appellant to cover the subsequent years. In January, 1939, the Commissioner of Revenues of the State of Arkansas made demand upon appellant for the State Income tax for the years 1928 to 1938 inclusive, on the ground that appellant was subject to the provisions of the income tax law even though it was located on a federal reservation. Appellant denied its liability for this tax for the years in question, and to prevent the levying and execution upon his property for the collection of this tax, it brought an action in the Chancery Court of Pulaski County, Arkansas, to restrain appellee,

in his official capacity as Commissioner of Revenues of the State of Arkansas, from collecting a state income tax for the years 1928 to 1938, inclusive, from appellant (R. 2).

Appellee filed a special demurrer to appellant's complaint, and the cause was heard by the Pulaski Chancery Court upon the complaint and special demurrer, at which time the court dismissed appellant's complaint as to the years 1936 to 1938 inclusive, but held that appellee was barred from collection of the State Income Tax for the years 1929 to 1935 inclusive, by the statute of limitations imposed under Section 26 of Act 118 of the Arkansas General Assembly of 1929 (R. 14).

Both parties declined to plead further and appellant prayed an appeal to the Arkansas Supreme Court which was granted. Appellee prayed a cross-appeal to the Arkansas Supreme Court on that portion of the decision of the Pulaski Chancery Court which held that the collection of the income tax for the years 1929 to 1935 inclusive, was barred by the statute of limitations. As to the year 1928, appellee conceded that the collection of the tax for that year was barred by the statute of limitations because appellant had filed its return for that year as required by law, and more than the statutory period had elapsed before appellee had made his demand for the payment of income tax.

The Arkansas Supreme Court affirmed the decision of the Chancery Court of Pulaski County upon the appeal and reversed the opinion of the Chancery Court of Pulaski County upon the cross-appeal, holding that the statute of limitations had not expired as to the years for which appellant had failed to file his return (R. 15). Within the time allowed by law, a petition for rehearing was filed and

by order of the court denied on the 13th day of May, 1940 (R. 20-22), the judgment at that time becoming final. Appellant then made application to the Honorable Griffin Smith, Chief Justice of the Supreme Court of Arkansas, for an appeal to this Court, which was granted, and on which, on the 14th day of October, 1940, this Court noted probable jurisdiction (R. 25).

SUMMARY OF ARGUMENT

I.

The State of Arkansas has jurisdiction to levy an Income Tax upon private businesses carried on within the confines of the Hot Springs National Park Reservation.

A. The Act of Congress granting the State of Arkansas the right to tax all structures and other property in private ownership as personal property, on the Hot Springs National Park Reservation, which grant was accepted by the Legislature of Arkansas, included the right to levy an Income Tax.

B. These reciprocal Acts of Congress and the Legislature of Arkansas did not restrict the State of Arkansas to the imposition of an ad valorem personal property tax, based on the value of the property.

C. Under these reciprocal acts, the State of Arkansas has the right to tax the income derived from the use of privately-owned personal property within the Hot Springs National Park Reservation in the same manner and with the same uniformity of treatment as other income derived from within the state is taxed.

II.

Limitations or reservations upon the right of a state to levy taxes within its territorial boundaries should not be given a strict construction. Such limitations, when acquiesced in by the federal government, constitute a mutual declaration of rights.

III.

In taxing income derived from personal property located on the Hot Springs National Park Reservation, the Arkan-

sas Income Tax Law is not invalid as taxing income derived from outside the State because such income is derived from within the confines of the geographical boundaries of the State.

In order to come within the prohibition of the decisions in McCarroll, Commissioner v. Gregory-Robinson-Speas, Inc., 198 Ark. 235, 129 S. W. (2d) 254, and Royster-Guano Co. v. Virginia, 253 U. S. 412, the income which the State of Arkansas is forbidden to tax must be derived from beyond the geographical boundaries of the State of Arkansas.

A. Collins v. Yosemite Park & Curry Company, 304 U. S. 517, is direct authority to sustain this proposition.

B. Buckstaff Bath House Company v. McKinley, Commissioner, 308 U. S. 358, likewise sustains this proposition.

IV.

The cases relied on by appellant concern regulatory or general law applicable to the Hot Springs National Park Reservation, not the tax law applicable to the Hot Springs National Park Reservation.

ARGUMENT

I.

THE STATE OF ARKANSAS HAS JURISDICTION TO LEVY AN INCOME TAX UPON PRIVATE BUSINESSES CARRIED ON WITHIN THE CONFINES OF THE HOT SPRINGS NATIONAL PARK RESERVATION.

A. The Act of Congress granting the State of Arkansas the right to tax all structures and other property in private ownership as personal property, on the Hot Springs Reservation, which grant was accepted by the Legislature of Arkansas, included the right to levy an income tax.

At the outset appellee states to this Court that it does not dispute the general proposition of appellant that sovereign jurisdiction over the Hot Springs National Park Reservation, within which boundaries appellant carries on its business, has been ceded to the United States Government by the State of Arkansas. Appellee acknowledges that the United States government possesses a sovereign interest in the Hot Springs National Park area rather than a proprietary interest.

Since this sovereign interest of the United States government has been conceded by appellee, the sole remaining problem for decision is the question as to the right of the State of Arkansas to levy a tax of the nature of the one here involved, upon the income from business carried on by private corporations or individuals within the confines of the Hot Springs National Park Reservation. The answer to this question depends upon the construction of the Act of Congress of March 3, 1891, which consented to certain taxation of private enterprise located on the federal areas, and the construction of the Act of the Arkansas Gen-

eral Assembly of February 21, 1903, which accepted the grant of taxation made to the State by the Act of Congress of March 3, 1891.

Appellee earnestly submits to this Court that even though the United States Government possesses sovereign jurisdiction over the area within which appellant carries on its business, both the United States and the State of Arkansas, by their respective legislation pertaining to the Hot Springs Reservation, have agreed that the State of Arkansas has retained the right to levy a State Income Tax against a private business, such as appellant's, carried on within the National Park area. In support of this position, appellee presents the wording of the federal and state statutes reserving the right of taxation to the State of Arkansas, and the pertinent cases decided by this Court and other courts interpreting these and similar statutory provisions.

On March 3, 1891, Congress passed the following Act:

> "The consent of the United States is hereby given for the taxation under the authority of the laws of the State of Arkansas applicable to the equal taxation of personal property in that State, as personal property, of all structures and other property in private ownership on the Hot Springs Reservation." (26 Stat. 844, c. 533, par. 5).

This Congressional Act must be read in conjunction with Act No. 30 of the General Assembly of Arkansas, approved February 21, 1903, which, after ceding sovereign jurisdiction over the Hot Springs Reservation to the United States, accepted the grant of taxation made to the State by the above-quoted Congressional Act of 1891 in the following words: "provided, further, that the right to tax all struc-

tures and other property in private ownership on the Hot Springs Reservation accorded the State by the Act of Congress approved March 3, 1891, is hereby reserved to the State of Arkansas."

In the view that appellee takes of this case, the answer to the question as to the basic power of the State of Arkansas to levy a tax of this nature depends upon the interpretation of these two Acts. The Act of Congress, while recognizing that the United States exercises sovereign jurisdiction over this area, nevertheless concedes that the State of Arkansas has the right and power to tax the personal property situated within the area. The Act of the Arkansas Legislature, while granting that the United States possesses sovereign jurisdiction over the Hot Springs area, nevertheless expressly reserves the right to tax all structures and other property in private ownership located within the area.

This reservation of the right to tax all structures and other property in private ownership located within the area, as personal property, includes the right to levy a tax in the nature of the one involved in the instant cause, since the Arkansas Income Tax law levies a tax upon the profits derived from the use of this type of personal property. Appellee submits that this view has been announced and followed by this Court in the case of Buckstaff Bath House Company v. McKinley, Commissioner, 308 U. S. 358, where this Court affirmed the doctrine that the right to tax the personal property within the Hot Springs Reservation carried with it the right to tax the use of such property. At page 360, this Court said:

> "Petitioner paid into the Treasury of the United States the tax required by the Social Security Act for that period. But it refused to pay the State tax and sued in the State Court to enjoin its collection on the

grounds, inter alia, that it is an instrumentality of the United States and that certain Acts of Congress and Statutes of Arkansas exempt it from such taxation. The Supreme Court of Arkansas affirmed a decree sustaining a demurrer to the bill and dismissing it, on the grounds that the Arkansas Statute was applicable to petitioner and that, on construction of the Acts in question, petitioner did not have the claimed immunity, 127 S. W. (2d) 802. We granted certiorari because that decision was asserted to be repugnant to the Acts vesting exclusive jurisdiction over the Hot Springs Reservation in the United States.

"Petitioner's contention here, as below, is based primarily on the Act of Congress of March 3, 1891, 26 Statutes 842, whereby the consent of the United States was given for the taxation, under the authority of the laws of the State of Arkansas applicable to the equal taxation of personal property in that State, as personal property of all structures and other property in private ownership on the Hot Springs Reservation (National Park). 16 U. S. C. A. Sec. 365. Petitioner points out that the tax imposed by the Social Security Act against which appropriate credits may be made for contributions under State laws is laid, as stated by this Court in Steward Machine Company v. Davis, 301 U. S. 548, 57 Sup. Ct. 883, 886, 887, 81 L.Ed. 1279, 109 A. L. R. 1293, 'as a duty, an impost, or an excise upon the relation of employment'; and that as held by the Supreme Court of Arkansas the tax in question is 'not a tax on personal property; nor is it, in any sense, a property tax.' 127 S. W. (2d) 805. Therefore, petitioner concludes that the United States did not confer on the State of Arkansas the power to impose such

a tax but retains its sovereign jurisdiction in that regard since the power of Arkansas to tax was limited to the enumerated property taxes.

"We agree with the Supreme Court of Arkansas that the State had jurisdiction to impose the tax in question.

* * * * *

"Whether the same result would follow in case the cession Act had absolutely forbidden a State to impose any tax on petitioner we need not decide. For here Arkansas did have a prior power to tax petitioner's property. The implied authority which we here find to exist is therefore used not to override an earlier express authority but merely to extend it to a degree. *For in final analysis the Arkansas tax does have some relation to the use of petitioner's property.* The existence of the implied authority does not therefore do violence to the earlier statutory grant." (Emphasis supplied).

Buckstaff Bath House Company v. McKinley, Commissioner, 308 U. S. at 360, 361, 362, 364, 365.

The view that the State had reserved the right to levy an income tax upon the profits derived from the use of such property located within the Hot Springs Reservation had previously been announced by the Supreme Court of Arkansas in the case of Buckstaff Bath House Company v. McKinley, Commissioner, 198 Ark. 91, 127 S. W. (2d) 802. In that case the Arkansas Supreme Court had before it the same situation as was presented to this Court in the case of Buckstaff Bath House Company v. McKinley, Commissioner, supra, and it held to the same effect as did this Court.

The Arkansas Supreme Court stated, in holding that the businesses located on the Hot Springs Reservation were subject to the State Unemployment Compensation Tax:

> "The tax laid by Act 155 (The State Unemployment Compensation Tax) is not a tax on personal property; nor is it, in any sense, a property tax. But the Congress seemingly intended (and this construction is strengthened by the Gaines case) to permit the State to exercise its sovereignty within the Reservation with respect to the conduct of business, commerce, and the professions, subject only to the interest retained by the Government and the right to enforce restrictions under the federal laws and under rules promulgated by the Interior Department.
>
> "Lands were leased; and individuals, corporations, partnerships, etc., were permitted to erect buildings and to engage in activities for profit and amusement. Healing properties of the medicinal waters were recognized and the use of such waters was circumscribed in order that opportunity might be afforded the public to enjoy the benefits.
>
> "But the Government, per se, did not engage in the business of operating appellant's bath house. On the contrary, it leased the site and fixed the fees to be charged by operators . . ."

And, following logically from the facts in the situation as outlined, the Court continues:

> "Conceding, as we must, that authority of the State to collect the tax does not come from the Social Security Act of Congress, yet *the power conferred by Act of* 1891 *to tax personal property impliedly carried with it the right to tax the use of such property to the*

same extent and in manner similar to property not within the Reservation." (Emphasis supplied).

Buckstaff Bath House Company v. McKinley, Commissioner, 127 S. W. (2d) at 805 and 806.

Appellee respectfully submits to this Court that these cases are sufficient authority for the proposition that private businesses operating within the Hot Springs federal area are subject to the State tax laws which apply to the use of personal property within the State of Arkansas. By virtue of the provisions in the Act of Congress of March 3, 1891, and the Act of the Arkansas General Assembly of February 21, 1903, both this Court and the highest Court of the State of Arkansas have held that the taxing reservation contained in these two legislative acts includes the taxes which the State may see fit to levy upon the use of personal property within the State. The tax in question, being a tax upon the profits derived from the use of personal property within the Hot Springs National Park Reservation, is valid, therefore, when applied to the profits derived from appellant's private business operations within the Hot Springs Reservation.

B. These reciprocal Acts of Congress and the Legislature of Arkansas did not restrict the State of Arkansas to the imposition of an ad valorem personal property tax based on the value of the property.

It is appellant's contention that the reservation of taxation by the respective Acts of Congress and the Arkansas General Assembly is limited to the levying and collection of an *ad valorem* personal property tax. It is appellee's position that the right of taxation granted by the United States and reserved by the State of Arkansas is not limited to the ad valorem personal property tax.

The attention of this Court is called to the wording of the two pertinent statutes, neither of which contain the words 'ad valorem'' personal property tax, nor any words from which such a restriction could reasonably be inferred. If such had been the intention of Congress or the Arkansas General Assembly, it could have easily been expressed in the statutes which granted and reserved the right of taxation. Under the familiar rule of statutory construction laid down on numerous occasions by this court, statutes are to be construed in their ordinary and natural meaning. It is apparent that these statutes fail to limit the state's right to tax property within the Hot Springs Reservation to the ad valorem personal property tax.

Appellant argues that the income tax was unknown at the time this taxing reservation was made, and therefore the Legislature could not have intended to include such a tax in the reservation. Appellee urges the converse of this contention; namely, that the ad valorem tax was practically the only tax levied by the State of Arkansas at the time these acts were passed. Therefore, it would have been the normal thing for the Legislature of Arkansas to use the words "ad valorem property tax" in the statute which reserved the right of taxation, if it desired such a restriction to be made, but it is noteworthy that these limiting words were not used. It was obviously the intention of the respective Legislatures to allow the personal property located within the federal area to be taxed in other modes than the ad valorem tax, inasmuch as no such restriction was placed in the statutes.

Appellant further contends, in effect, that because the Legislature and Congress did not mention income tax in the provisions of the respective statutes, the State of Arkansas is limited to the collection of an ad valorem personal

property tax from appellant. In other words, says appellant, only the ad valorem personal property tax was intended to be applied by the respective legislative bodies. Appellee submits that these legislators wisely refrained from limiting the taxation of appellant, and others in a similar situation, to the ad valorem personal property tax, simply restricting the State of Arkansas to the imposition of a tax on the *personal property* within the reservation.

These legislators undoubtedly realized that at some time in the future other taxes than the ad valorem tax might be levied upon personal property by the State, and, therefore, they made provision in these statutes for such personal property taxes. This foresight would serve to protect the State from the loss of an unduly large amount of tax revenue from the increased growth of federal areas. Such a view is expressed by this Court in the case of James v. Dravo Contracting Company, 302 U. S. 134, where this Court said:

> "The possible importance of reserving to the State jurisdiction for local purposes which involve no interference with the performance of governmental functions is becoming more and more clear as the activities of the Government expand and large areas within the States are acquired. There appears to be no reason why the United States should be compelled to accept exclusive jurisdiction or the State be compelled to grant it in giving its consent to purchases."

James v. Dravo Contracting Company, 302 U. S. 134, at page 148.

Additional evidence that the respective legislative bodies intended that the State of Arkansas should be allowed to levy other personal property taxes than the ad valorem

personal property tax is found in an Act of Congress which provides that:

> "All fugitives from justice taking refuge within (the boundaries of the reservation) shall, on due application to the executive of (Arkansas), whose warrant may lawfully run within said territory for said purpose, be subject to the laws which apply to fugitives from justice found in the State of Arkansas. Said section shall not be construed as to interfere with the right to tax all structures and other property in private ownership within the boundaries (described), accorded to the State of Arkansas by Sec. 365 of (Title 16, United States Code Annotated").

U. S. C. A., Title 16, Section 372.

It should be noted that the last sentence in this statute states that "the right to tax all structures and other property in private ownership within the boundaries accorded to the State of Arkansas by Sec. 365 of Title 16, U. S. C. A.", should not be interfered with. Congress did not mention any restriction upon the taxing right of the State of Arkansas in this statutory enactment; it described the right of taxation of the State as including the right to tax all structures and other property in private ownership within the boundaries of the Hot Springs Reservation, without any limitation to a particular form of such taxation.

The decision of this Court in Buckstaff Bath House Company v. McKinley, Commissioner, supra, and the decision of the Supreme Court of Arkansas in Buckstaff Bath House Company v. McKinley, Commissioner, supra, support appellee's position upon this point. Certainly the Unemployment Compensation tax was not included by name in the statutes which granted and reserved the right to tax

personal property within the federal areas, yet this Court and the highest Court of the State of Arkansas joined in the pronouncement that the State had the right to levy this tax upon businesses located within the Hot Springs Reservation.

Appellee urges, therefore, that the State reserved the right to tax personal property in other modes than the ad valorem personal property tax, and that the right to levy the State Income Tax, which is levied upon the profits from the use of such property, was reserved by the State of Arkansas and granted by the United States.

C. Under these reciprocal acts, the State of Arkansas has the right to tax the income derived from the use of privately-owned personal property within the Hot Springs Reservation in the same manner and with the same uniformity of treatment as other income derived from the use of personal property within the State is taxed.

Appellee concedes that the State Income Tax is not a property tax in the sense of a direct ad valorem property tax based upon the value of property, but appellee submits that the income tax is a tax upon the use of property, and, hence, is permitted under the statutes of Congress and the Arkansas General Assembly which reserved to the State of Arkansas the right to tax the personal property within the confines of the Hot Springs Reservation. The right to tax property carries with it the right to tax the use of such property, because the term "property" is the generic term which covers all of the component features of the total concept "property."

The right to own property, the right to use property, the right to possess property, the right to move property from place to place, the right to bequeath property—these and

other attributes are but separate elements which go to make the concept "property." Therefore, the right to tax personal "property" carries with it the right to tax the use of such property, since the use of the property is simply one privilege included in the general concept of "property."

As previously pointed out, this view was expressed by this Court in the case of Buckstaff Bath House Company v. McKinley, Commissioner, supra, where the Court said, at page 365:

> "For in final analysis the Arkansas tax does have some relation to the use of petitioner's property."

Appellee submits that the income tax has a much closer relation to the use of appellant's property than did the Unemployment Compensation tax in the case cited above, and, therefore, if this Court and the Supreme Court of Arkansas have already decided that the State of Arkansas may levy an Unemployment Compensation Tax upon private business operating within the Hot Springs area, then the State Income Tax is valid in its levy upon the profits derived from the use of property located within the Hot Springs Reservation.

Prior to the case of Buckstaff Bath House Company v. McKinley, Commissioner, supra, this Court had already expressed its view that if the right to tax property exists, the right to tax the use of that property is also present. In Henneford v. Silas Mason, 300 U. S. 577, this Court said:

> "The privilege of use is only one attribute, among many, of the bundle of privileges that make up property or ownership. A state is at liberty, if it pleases, to tax them all collectively, or to separate the faggots and lay the charge distributively."

Henneford v. Silas Mason, 300 U. S. at 582.

In other words, the Court holds that if a state has the right to tax property, in the generic sense, it has the right to tax the use, or any other component part, of the property. Necessarily, the right to tax the use of property includes the right to tax the profits springing from the use of property.

In an earlier case, Corliss v. Bowers, 281 U. S. 376, this Court says:

> "Taxation is not so much concerned with the refinements of title as it is with the actual command over the property taxed, the actual benefit for which the tax is paid."

Corliss v. Bowers, 281 U. S. 376, at 378.

Again this Court said in N. C. and St. L. Ry. v. Wallace, 288 U. S. 249:

> "The power to tax property, the sum of all the rights and powers incident to ownership necessarily includes the power to tax its constituent elements."

N. C. and St. L. Ry. v. Wallace, 288 U. S. 249, at 267 and 268.

If the power to tax property includes the power to tax its constituent elements, then it logically follows that the power to tax property, such as was reserved to the State of Arkansas by the Statutes of 1891 and 1903, includes the right to tax the use of that property, which is certainly one of the constituent elements of the general concept, "property."

While it is true that the decision of the Arkansas Supreme Court in Ex Parte Gaines, 56 Ark. 212, 19 S. W. 602,

is no longer controlling because the statute of 1903 was passed subsequent to the date of that decision, which was rendered in 1892, appellee feels that the words of the Court in that opinion contain a compact summary of the tax situation with regard to private businesses located on the Hot Springs Reservation. At pages 215 and 216, that Court said:

> "No part of the Reservation, while owned by the United States, can be subjected to taxation by the State. Van Brocklin v. Tennessee, 117 U. S. 151. But when the Government parts with its title, or any interest therein, the property or interest which the Government parts with becomes subject to taxation. When it makes a lease to an individual of any interest or privilege in its lands within the Reservation, the interest of the lessee, whatever it may be, may be taxed, subject however, to all the rights and interests which the United States retains in the property.
>
> . . . .
>
> "The interest of the lessee in the land is not the property of the United States, and it is not a means employed by the Government to obtain a governmental end. The power to tax that interest does not involve therefore the power to destroy or disturb any interest of the United States Government.
>
> . . . .
>
> "All property in Arkansas belonging to individuals is subject to taxation except such as is specially exempted by the Constitution. Nothing else is or can be made exempt. Little Rock, etc., R. Co. v. Worthen, 46 Ark. 312. The interest which the appellant acquired by his lease was property, and is not exempt under the

law. It was the duty of the assessor to return it for taxation."

Appellee feels that this exposition of the general law governing the situation of appellant is still pertinent in shedding light on the proper rights of appellant in his tax relationship with the State of Arkansas.

If further authority than the case of Buckstaff Bath House Company v. McKinley, Commissioner, supra, is needed, appellee submits that the case of Collins v. Yosemite Park & Curry Company, 304 U. S. 517, decided on May 31, 1938, supports appellee's position in the instant cause.

By an Act of April 15, 1919, California granted exclusive jurisdiction over Yosemite Park as a whole, to the United States Government, reserving certain rights, including the right "to tax persons and corporations, their franchises and property" on the lands included; and this was accepted by the Act of Congress of June 2, 1920. The State of California, under her State liquor laws, sought to levy a license fee against sellers of alcoholic beverages within the Park, and also to tax the sales of alcoholic beverages within the Park area. This Court held that this taxing reservation did not authorize the State to exact, for the sale or importation of alcoholic beverages in the Park, the fees for license which are provided by the California liquor laws, because those provisions were regulatory in character. The reservation, however, authorized the State to tax sales in the Park, under the California Liquor Tax Laws. In other words, the State had retained the right to levy a sales tax upon the sale of certain beverages within the area over which the United States exercised sovereign jurisdiction, by virtue of the clause in the Statute of cession previously quoted, even though this clause does not mention sales tax in any fashion.

This Court said on this point:

"The lower Court, in interpreting the language of the Acts of grant and acceptance was of the opinion that the saving of 'the right to tax persons and corporations, their franchises and property' was not sufficiently broad to justify the collection of fees for licenses under Section 5 and sales under Sections 23 and 24 of the Alcoholic Beverage Control Act . . .

"A different conclusion obtains, however, with respect to the excise tax provisions of the Alcoholic Beverage Control Act, laying a tax, at a specified rate per unit sold, on beer, wine, and distilled spirits sold out 'in this State', ..." This Act is restricted to sales in this State', but that term embraces all territory within the geographical limits of the State . . . .
"as in our judgment, as heretofore pointed out, *the tax provisions are enforceable* and the regulatory provisions unenforceable, it is necessary to reverse the decree . . ." (Emphasis supplied).

Collins v. Yosemite Park & Curry Company, 304 U. S. 518, at 530, 534, 535, 539.

Although the State statute in this case reserved "the right to tax persons and corporations, their franchises and property", and did not mention sales tax in any manner, this Court held that such a reservation gave the State of California the right to levy a sales tax upon all the beer, wine, and distilled spirits sold within the confines of the federal area involved in that case. If a sales tax was authorized by the words of such a statute, then an income tax is a most proper method of taxation under the words of the statutes in the case at bar.

Appellee submits, therefore, that the decision of this

Court in the cases of Buckstaff Bath House Company v. McKinley, Commissioner, supra, and Collins v. Yosemite Park & Curry Company, supra, and the decision of the Supreme Court of Arkansas in Buckstaff Bath House Company v. McKinley, Commissioner, supra, hold conclusively that the right to levy a tax in the nature of the one here involved was reserved to the State of Arkansas by the Congress of the United States and the General Assembly of Arkansas.

II.

LIMITATIONS OR RESERVATIONS UPON THE RIGHT OF A STATE TO LEVY TAXES WITHIN ITS TERRITORIAL BOUNDARIES SHOULD NOT BE GIVEN A STRICT CONSTRUCTION. SUCH LIMITATIONS, WHEN ACQUIESCED IN BY THE FEDERAL GOVERNMENT, CONSTITUTE A MUTUAL DECLARATION OF RIGHTS.

In construing a reservation of power by a State in an Act of cession, and the grant of that power in concurrence therewith by the United States Government, appellee urges that such reservations should be given liberal construction by the Courts.

In Collins v. Yosemite Park & Curry Company, supra, the Court says on this point, at page 532:

> "As the respective Acts of State and Nation were in the nature of a mutual declaration of rights, this is not an occasion for strict construction of a grant by a State limiting its taxing power." (Emphasis supplied).

Any doubt as to the extension of the power of taxation to include a situation that arises subsequent to the passage of the Act of cession, therefore, should be resolved in favor of

the governmental body which has relinquished jurisdiction over the area in question, in order that complete expression may be given to the intention of the respective legislative assemblies.

In Buckstaff Bath House Company v. McKinley, Commissioner, supra, this Court reiterated its holding that limitations upon the taxing powers of a State should be given a liberal construction.

Said this Court:

> "We agree with the Supreme Court of Arkansas that the State had jurisdiction to impose the tax in question.
>
> "Whether the same result would follow in case the cession Act had absolutely forbidden a State to impose any tax on petitioner we need not decide. For here Arkansas did have a prior power to tax petitioner's property. The implied authority which we here find to exist is therefore used not to override an earlier express authority but merely to extend it to a degree."

Buckstaff Bath House Company v. McKinley, Commissioner, 308 U. S. at 365.

By giving a liberal construction to the statute of tax reservation this Court thereby followed its pronouncement in Collins v. Yosemite Park & Curry Company, supra.

If the Courts gave a strict construction to such reservations of taxing authority, then the States would be limited to the imposition of those taxes which were in existence at the time of the passage of the granting and reserving Acts. Such a construction would mean that the states would be deprived of increasingly large sums of revenue by virtue of the fact that the federal government had acquired exten-

sive areas within the states for the carrying out of its normal functions and for that reason, if no other, state tax acts should be held valid in their application to private businesses carried on within federal areas, where the restrictive statutes furnish a reasonable basis for such a view.

III.

IN TAXING INCOME DERIVED FROM PERSONAL PROPERTY LOCATED ON THE HOT SPRINGS RESERVATION, THE ARKANSAS INCOME TAX IS NOT INVALID AS TAXING INCOME DERIVED FROM OUTSIDE THE STATE, BECAUSE SUCH INCOME IS DERIVED FROM WITHIN THE CONFINES OF THE GEOGRAPHICAL BOUNDARIES OF THE STATE.

In order to come within the prohibition of the decision in McCarroll, Commissioner v. Gregory-Robinson-Speas, Inc., 198 Ark. 235, 129 S. W. (2d) 254, and Royster-Guano Company v. Virginia, 253 U. S. 412, the income which the State of Arkansas is forbidden to tax must be derived from beyond the geographical boundaries of the State of Arkansas.

A. Collins v. Yosemite Park & Curry Company, 304 U. S. 517, is direct authority to sustain this proposition.

Appellant in his brief contends that the State of Arkansas could not levy and collect an income tax from appellant because appellant operated and carried on its entire business within the confines of the Hot Springs National Park Reservation, and that this area was "outside" the State of Arkansas, within the meaning of the decision of the Arkansas Supreme Court in the case of McCarroll, Commissioner v. Gregory-Rob-

inson-Speas, Inc., 198 Ark. 235, 129 S. W. (2d) 254, and Royster-Guano Company v. Virginia, 253 U. S. 512. Appellee believes that consideration of appellant's statement as to his position and supporting argument is sufficient to show that appellant's view is erroneous and untenable.

In McCarroll v. Gregory-Robinson-Speas, Inc., supra, the Court held that the income of domestic corporations derived from outside the State could not be taxed by the State of Arkansas, but the holding in that case was to exempt domestic corporations doing business both within and without the State from paying an income tax on their earnings from without the State, because domestic corporations doing business entirely without the State were not subject to an income tax on their earnings. Appellee believes that this decision is limited strictly to a situation where a domestic corporation derives income from within the State of Arkansas and *from other States*. To stretch the holding in McCarroll v. Gregory-Robinson-Speas Inc., supra, to income derived from the use of property on United States Reservations, such as appellant attempts to do here, is an extension of this decision to unwarranted lengths, a fact which becomes apparent at first glance.

It is obvious that income derived from a business carried on within a Reservation of the United States, where the Reservation is within the geographical boundaries of a State, is not income derived from outside the State.

Collins v. Yosemite Park & Curry Company, supra, is direct and controlling authority to sustain this proposition.

In that case, the California liquor laws imposed a tax per unit upon beer and wine sold "in this State" by a rectifier or wholesaler thereof. This Court held that this tax upon the sales of alcoholic beverages "in this State" ap-

plied to sales made within the confines of the National Park Reservation, even though exclusive, sovereign jurisdiction, with only a taxing reservation, had been ceded to the United States. The Court said on this question, at page 534:

> "A different conclusion obtains, however, with respect to the excise tax provisions of the Alcoholic Beverage Control Act, laying a tax, at a specified rate per unit sold, on beer, wine, and distilled spirits sold 'in this State' . . . The Act is restricted to sales '*in this State,*' but *that term embraces all territory within the geographical limits of the State* . . ." (Emphasis supplied).

The facts in the Collins case, supra, are almost identical with those of the instant cause so far as the question of taxing business operations "within" the United States Reservation is concerned, and the United States Supreme Court squarely held that business operations carried on within the confines of a United States Reservation were taxable by the State within whose geographical boundaries the Reservation was contained.

In the case at bar, the Hot Springs National Park Reservation is unquestionably within the geographical boundaries of the State of Arkansas, and hence, under the decision of this Court in Collins v. Yosemite Park & Curry Company, supra, appellant derives its income from within the State of Arkansas within the meaning of the Court in McCarroll, Commissioner v. Gregory-Robinson-Speas, Inc., supra, and Royster-Guano Company v. Virginia, supra.

B. Buckstaff Bath House Company v. McKinley, Commissioner, 308 U. S. 358, likewise sustains appellee's position.

If authority in addition to the case of Collins v. Yosemite Park & Curry Company, supra, is neccessary, appellee sub-

mits that the decision of this Court in Buckstaff Bath House Company v. McKinley, Commissioner, supra, and that of the Supreme Court of Arkansas in Buckstaff Bath House Company v. McKinley, Commissioner, supra, supports his position in the instant cause. In both of these cases it was held that the Buckstaff Bath House Company was subject to the provisions of the State Unemployment Compensation Law.

By the terms of this Unemployment Compensation Law, only businesses carried on within this State are subject to the terms of this Act; therefore, if the Buckstaff Bath House Company, which operated a business within the Hot Springs Reservation just as appellant does in the instant cause, was subject to the provisions of the Arkansas Unemployment Compensation Law, it must necessarily have been within the State of Arkansas, even though its entire business was operated and carried on within the Hot Springs Reservation.

As the Supreme Court of Arkansas said in its opinion when the case at bar was before it for decision:

> "*We do not agree with appellant that the reservation, for purposes of taxation, is not within the State.* If this theory were correct, the Buckstaff Bath House case was wrong, for Act 155 of the Arkansas General Assembly could have no extra-territorial effect." (Emphasis supplied.)

Superior Bath House Company v. McCarroll, Commissioner, The Law Reporter, Vol. 72, at page 799, 139 S. W. (2d) at page 378.

Appellee submits, therefore, that appellant's income is not derived from outside the State of Arkansas within the meaning of the decisions which have held that the State of

Arkansas does not have the right to tax income of domestic corporations derived from outside the State.

IV.

THE CASES RELIED UPON BY APPELLANT CONCERN REGULATORY OR GENERAL LAW APPLICABLE TO THE HOT SPRINGS NATIONAL PARK RESERVATION, NOT THE TAX LAW APPLICABLE TO THE HOT SPRINGS PARK RESERVATION.

Appellant cites several cases in his brief which appellee feels are not pertinent to the decision in the instant cause. These cases decided questions of general law, whereas in the case at bar the sole question is one of the scope of the state's taxing authority. Such is the distinction between the instant case and the case of Williams v. Arlington Hotel Company, 22 F. (2d) 669, and Arlington Hotel Company v. Fant, 278 U. S. 439. In both of these cases the State Acts in question were regulatory Acts by which the State was attempting to exercise its police powers. Such regulations affected the government rights to use its own lands and, of course, could have seriously hampered the government in the exercise of its power to lease lands within the Reservation.

The same distinction may be drawn in the case of Fant v. Arlington Hotel Company, 170 Ark. 440, 280 S. W. 20, and Arlington Hotel Company v. Fant, 176 Ark. 613, 4 S. W. (2d) 7. Each of these cases is concerned with the question of the jurisdiction of causes of action arising on the Hot Springs Reservation. In each case the cause of action had to be determined by the laws of the Reservation, and not the laws of Arkansas, because the State of Arkansas had yielded its sovereign powers over the Hot Springs Reser-

vation to the Federal Government, as appellee conceded at the outset of this brief, and, therefore, the general laws of the State of Arkansas had no application as to a cause of action arising within the Reservation. Such, however, is not the rule with regard to the taxing power of the State of Arkansas pertaining to the Hot Springs Reservation; this is a matter which is governed entirely by the provisions of the two pertinent statutes of Congress and the Arkansas General Assembly of 1891 and 1903 respectively, and it is to these statutes that the Court must look in order to determine the validity of the tax in question in the case at bar.

As pointed out by this Court in James v. Dravo Contracting Company, supra, at page 147:

> "It is not questioned that the State may refuse its consent and retain jurisdiction consistent with the governmental purposes for which the property was acquired. The right of eminent domain inheres in the Federal Government by virtue of its sovereignty and thus it may, regardless of the wishes either of the owners or of the States, acquire the lands which it needs within their borders. Kohl v. United States, 91 U. S. 367, 371, 372. In that event, as in cases of acquisition by purchase without consent of the State, jurisdiction is dependent upon cession by the State and the State may qualify its cession by reservations not inconsistent with the governmental uses."

In other words, it is entirely consistent with the respective sovereignties of the State and Federal Government that land be ceded to the federal government with the State retaining the right to pass tax legislation which applies to the federal area, when a sufficient reservation has been made by the State for that purpose.

CONCLUSION

The case may be thus recapitulated:

1. The State of Arkansas has jurisdiction to levy an income tax upon private business carried on within the confines of the Hot Springs National Park Reservation, because a reasonable construction of the statutes of Congress and the Arkansas General Assembly permits such a tax.

2. These reciprocal Acts of Congress and the Arkansas General Assembly do not restrict the State of Arkansas to the imposition of an ad valorem personal property tax upon private businesses operated within the Hot Springs National Park Reservation.

3. The right to tax the personal property in private ownership within the Hot Springs Reservation includes the right to tax the profits flowing from the use of such property.

4. Reservations upon the right of a State to levy taxes within its own boundaries should not be given a strict construction.

5. The Hot Springs Reservation is not outside the State of Arkansas, within the meaning of decisions forbidding the State of Arkansas to tax income of domestic corporations derived from outside the State.

It is submitted that the Supreme Court of Arkansas was entirely correct in its action and in the reasons given for that action and its decree should be affirmed.

Respectfully submitted,

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APPENDIX

Act No. 30 of the General Assembly of the State of Arkansas, approved February 21, 1903:

> "Section 1. That exclusive jurisdiction over that part of the Hot Springs Reservation known and described as part of the Hot Springs mountain and whose limits are particularly described by the following boundary lines *** all in Township 2 South, Range 19 West, in the County of Garland, State of Arkansas, being a part of the permanent United States Hot Springs Reservation, is hereby ceded and granted to the United States of America, to be exercised so long as the same shall remain the property of the United States; provided, that this grant of jurisdiction shall not prevent the execution of any process of the State, civil or criminal, on any person who may be on such reservation or premises; provided, further, that the right to tax all structures and other property in private ownership on the Hot Springs Reservation accorded the State by the Act of Congress approved March 3, 1901" (1891) "is hereby reserved to the State of Arkansas."

Act of Congress, March 3, c. 533 par, 26 Stat. 844:

> "The consent of the United States is hereby given for the taxation under the authority of the laws of the State of Arkansas applicable to the equal taxation of personal property in that State, as personal property, of all structures and other property in private ownership on the Hot Springs Reservation."

Act of Congress, April 20, 1904, c. 1400, par. 1, 33 Stat. 187:

"The portion of the Hot Springs mountain reservation in the State of Arkansas situated and lying within boundaries defined as follows *** all in Township 2 South, Range 19 West, in the County of Garland and State of Arkansas, being a part of the permanent Unied States Hot Springs Reservation, sole and exchausive jurisdiction over which was ceded to the United States by an Act of the General Assembly of the State of Arkansas ***, which cession is hereby accepted *** shall be under the sole and exclusive jurisdiction of the United States ***. Provided that nothing in this Act shall be so construed as to forbid the service within the said boundary of any civil or criminal process of any court having jurisdiction in the State of Arkansas *** And provided, further, that this Act shall not be so construed as to interfere with the right to tax all structures and other property in private ownership within the boundaries above described accorded to the State of Arkansas by Section 5 of the Act of Congress approved March 3, 1891, entitled 'An Act to Regulate the Granting of Leases at Hot Springs, Arkansas, and for Other Purposes'."

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SUPREME COURT OF THE UNITED STATES.

No. 180.—October Term, 1940.

Superior Bath House Company, Appellant, *vs.* Z. M. McCarroll, Commissioner of Revenues for the State of Arkansas.	Appeal from the Supreme Court of the State of Arkansas.

[February 3, 1941.]

Mr. Justice Black delivered the opinion of the Court.

By a 1929 Act, Arkansas imposed a tax of 2% on the net income of domestic corporations "with respect to carrying on or doing business" in the state.[1] Appellant, a corporation organized under Arkansas law, leases from the United States and operates for profit a bath house on the federal reservation at Hot Springs. Whether appellant is subject to the state tax depends on the interpretation of the the language of a provision of a Congressional Act of 1891 and the corresponding provision of an Arkansas Act of 1903. The Congressional Act reads: "The consent of the United States is hereby given for the taxation under the authority of the laws of the State of Arkansas applicable to the equal taxation of personal property in that State, as personal property of all structures and other property in private ownership on the Hot Springs Reservation."[2] The 1903 Arkansas act ceded to the United States exclusive jurisdiction over the business area of the reservation, reserving only the right to tax accorded by the 1891 Act and the right to

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1 Ark. Acts (1929) No. 118.

2 26 Stat. 844. The quoted language was section 5 of a general Act dealing with the reservation. The section was added as a Senate amendment to a House bill, and the only relevant legislative reference to it is a statement by the House conferees that "Section 5 provides for local taxation of the bath houses, so far as the consent of the United States is concerned." 22 Cong. Rec. 3513. Arkansas, in ceding exclusive jurisdiction over part of the reservation, expressly referred to the taxing powers conferred by the 1891 Act (Ark. Acts (1903) No. 30), and later federal Acts extending exclusive federal jurisdiction over larger portions of the reservation have provided that such extension of jurisdiction shall "not be so construed as to interfere with the right to tax all structures and other property. . . ." (E. g., 33 Stat. 187.)

serve criminal and civil process.[3] The Supreme Court of Arkansas held appellant liable for the tax,[4] and the case is here on appeal, as authorized by 28 U. S. C., § 344.

Arkansas does not contend, nor did the Supreme Court of that state hold, that appellant was liable for the state income tax under the general power of the state to tax corporations created pursuant to Arkansas law. On the contrary Arkansas admits that under the reciprocal state and federal acts the United States possesses complete sovereign power over the Hot Springs Reservation, subject to the right of the State of Arkansas to tax in accordance with the 1891 Act and subject to its right to execute within the reservation its civil and criminal process. The state does not claim a right of any kind to tax any corporation or individual doing business on the reservation unless the tax comes within the scope of its agreement with the government, effectuated by the 1891 and 1903 federal and state legislation. Since the state has taken this view, and since it is our opinion that the tax can be sustained on this basis, it is unnecessary for us to determine whether any other basis might conceivably exist.

While not controlling here, it has been the consistent conviction of the Arkansas court that the federal legislation conferred broad powers of taxation upon the state. In *Ex parte Gaines,* 56 Ark. 227, decided one year after the original 1891 Act, the court held that a leasehold interest on the reservation was subject to state taxation. In *Buckstaff Bath House Co.* v. *McKinley,* 198 Ark. 91,[5] the court upheld the state unemployment compensation tax, saying of the 1891 Act: "The Congress seemingly intended (and this construction is strengthened by the *Gaines* case) to permit the State to exercise its sovereignty within the Reservation with respect to the conduct of business, commerce, and the professions, subject only to the interest retained by the Government and the right to enforce restrictions under the federal laws . . . ."

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[3] Ark. Acts (1903) No. 30.

[4] 139 S. W. (2d.) 378. In addition to urging that Arkansas had no power to levy this tax, appellant had urged that it was denied equal protection by virtue of a 1931 statute exempting from the tax those domestic corporations organized for the purpose of doing business outside the state. (Ark. Acts (1931) No. 220.) This latter contention is wholly without merit, and will not be discussed.

[5] Affirmed on other grounds, 308 U. S. 358.

Appellant, however, reads the Act more narrowly than does the Arkansas court, and contends that the only taxes Arkansas can levy are ad valorem taxes imposed directly on tangible property. But the words tangible and ad valorem appear nowhere in the Act, nor do any synonymous words there appear. And in our opinion to construe the Act as though such words had been used would do violence to the intent of Congress. The language of Congress was peculiarly adapted to the broadening of the state's taxing power—not to its restriction. Thus, though under Arkansas law structures attached to land were considered a part of the realty, taxable or non-taxable with the land,[6] Congress provided that privately owned structures on the tax exempt land of the reservation should be taxed "as personal property." Not only was this done, but also all "other property in private ownership" was expressly made subject to state taxation. By these provisions Congress manifested its purpose that no type of privately owned property should escape the state's taxing power merely because it was owned or used on the reservation.

And appellant's insistence that these provisions permit only ad valorem taxation loses sight of the fact that the word property is by no means limited, in all its variations, to actual tangible physical things.[7] Its meaning must be determined from its context as illumined by the subject treated and the objectives sought. It is true that Arkansas had no corporate income tax in 1891, when the original permission to tax was granted. But taxation policies and systems change with necessities and experience, and no support can be found in the Act for a belief that Congress consented to state taxation only if Arkansas would make its 1891 tax system static. If we accept appellant's premise that what Congress consented to was ad valorem taxation only, we must conclude that Congress consented to a tax under which Arkansas was collecting virtually all of its revenues in 1891. Since 1900, state governments—Arkansas included—have tended to secure less and less of their revenue from ad valorem tax-

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[6] At the time of the 1891 Act, the Arkansas law provided that "The term 'real property and lands' . . . shall be held to mean . . . all buildings, structures and improvements, and other fixtures of whatever kind. . . ." Ark. Stats. (Mansfield, 1884) § 5585. See Union Compress Co. *v.* State, 64 Ark. 136. Such is still the Arkansas law. Ark. Dig. Stats. (Pope, 1937) § 13358.

[7] Cf. Fidelity & Deposit Co. *v.* Arenz, 290 U. S. 66, 68.

ation, and more and more from taxes of other types.[8] The Arkansas legislature, in fact, in the preamble to the 1929 income tax act, gave as a reason for its adoption that "Agricultural and Industrial development is now being retarded because of a policy to secure practically all of the Revenue from an Advalorem Tax, thus penalizing and discouraging ownership of property. . . . ."[9] The narrow construction of the Act urged by appellant—a corporation created under the laws of Arkansas—would thus relieve it from an Arkansas tax on corporate income enacted, at least in part, as a substitute for those state ad valorem taxes to which appellant admits it is subject. And "The privilege of use is only one attribute, among many, of the bundle of privileges that make up property or ownership."[10] It is our opinion that the decision below must be affirmed.[11]

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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8 Arkansas, for example, received approximately 77% of its total revenue from general property taxes in 1915, while in 1937 this source accounted for only 13%. Financial Statistics of States, 1915, Table 3, pp. 66-67; *id.*, 1937, Table 5, pp. 36-41.

9 Ark. Acts (1929) No. 118. Compare the preceding footnote.

10 Henneford *v.* Silas Mason Co., 300 U. S. 577, 582.

11 Cf. Buckstaff Bath House Co. *v.* McKinley, 308 U. S. 358; Collins *v.* Yosemite Park & Curry Co., 304 U. S. 518.

SUPREME COURT OF THE UNITED STATES.

No. 180.—October Term, 1940.

Superior Bath House Company, Appellant, v. Z. M. McCarroll, Commissioner of Revenues for the State of Arkansas.	Appeal from the Supreme Court of the State of Arkansas.

[February 3, 1941.]

Mr. Justice Stone, concurring.

Mr. Justice Roberts and I concur in the judgment of the Court but upon different grounds from those stated in its opinion.

The state court has held that so far as the state constitution and laws are involved it has power to lay the present tax. It is no concern of ours what reasons are assigned for that conclusion. The only question for decision here is whether there is anything in the acts of Congress establishing the reservation or in the relationship of the two sovereignties, state and national, to prevent the state from laying a tax on the net income of its own corporation.

If the consent of the national government were needful in order to sustain the present tax we should have difficulty in finding that consent in the words of the Act of Congress authorizing the state to tax "all structures and other property in private ownership on the . . . reservation". But we think that such consent is unnecessary to enable a state to tax the income of its own corporations, derived from property located on the reservation. It is enough that no Act of Congress and no agreement by the state with the Federal Government prohibits the tax.

The fact that income-producing property is physically located on the territory of another sovereignty does not foreclose the state from taxing its own residents and corporations on the income derived from the property. *Cohn* v. *Graves,* 300 U. S. 308; *Lawrence* v. *State Tax Commission,* 286 U. S. 276; see *Newark Fire Insurance Co.* v. *State Board,* 307 U. S. 313. We have recently held that such a tax is not a tax on the income-producing property in any such sense as to preclude the tax for want of "jurisdiction" of the state to lay it. *Cohn* v. *Graves, supra,* 313, 314; *Graves* v. *O'Keefe,* 306

U. S. 466, 480. There is no occasion now to give renewed currency to the notion erroneously attributed to *Pollock* v. *Farmers Loan & Trust Co.,* 157 U. S. 429; *cf. Cohn* v. *Graves, supra,* 314, 315, that a tax on income is subject to the limitations of a tax on the property which produces it.

For that reason if Arkansas had made an unrestricted grant of the reservation it could not be said to have renounced its authority to tax income of its corporations or citizens derived from property on the reservation, more than if it were located in the District of Columbia or in another state. It clearly has not done so by reserving the right to lay a property tax within the reservation or by agreeing that the United States shall have exclusive jurisdiction over it for any or for every purpose. The state's power to lay the tax, being independent of its jurisdiction over the ceded territory, subsists unless waived or prohibited by competent authority.

Whatever constitutional power the federal government may have to prohibit the state taxation of income derived from property located on the reservation, regarded as a federal instrumentality, it is plain that it has not assumed to exercise the power. *Graves* v. *O'Keefe, supra,* 480. Since the state has not surrendered its constitutional power to tax the income and since Congress has not assumed in the act establishing the reservation, or otherwise, to prohibit the tax, the power of the state is unimpaired, unless restricted by its own constitution and laws.

Mr. Justice Frankfurter while agreeing with the Court's opinion also agrees with the view expressed in this opinion.